

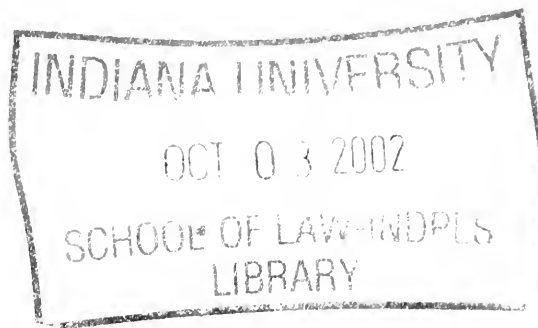


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Volume 35 No. 3 2002

TRIBUTE

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William Marsh

NATIONAL SYMPOSIUM ON JUDICIAL CAMPAIGN CONDUCT AND THE FIRST AMENDMENT

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Robert F. Bauer
Lillian R. BeVier
Richard Briffault
Anthony Champagne
Erwin Chemerinsky
Stephen Gillers

Deborah Goldberg
Shanto Iyengar
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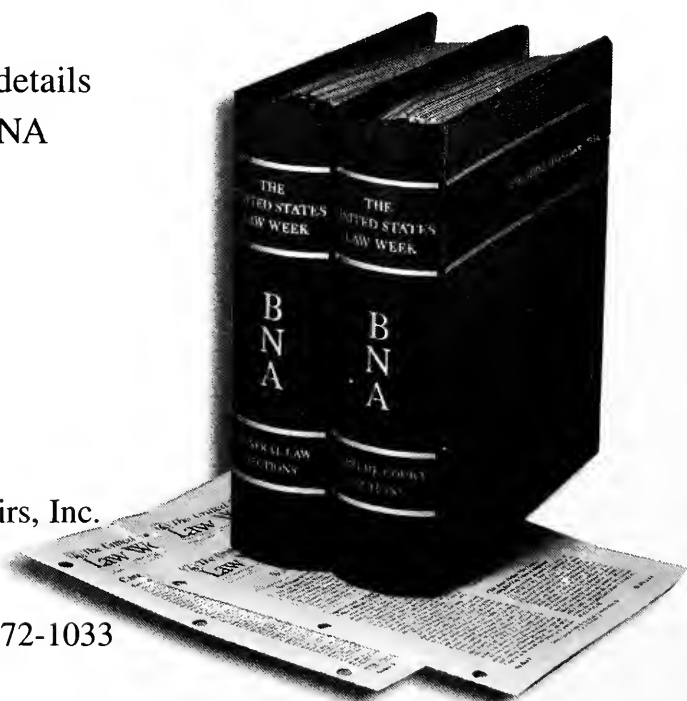
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Volume 35

2001-2002



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(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Subscriptions. Current subscription rates for an academic year are \$30.00 (domestic mailing) and \$35.00 (foreign mailing) for four issues. Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. ***Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.***

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POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.



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WILLIAM ANDREW KERR, *Professor of Law Emeritus*. A.B., West University; J.D., LL.M., Harvard University; B.S., Duke University.

WILLIAM E. MARSH, *Professor of Law Emeritus*. B.S., J.D., University of Nebraska.

MELVIN C. POLAND, *Cleon H. Foust Professor of Law Emeritus*. B.S., Kansas State University; LL.B., Washburn University; LL.M., University of Michigan.

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TRIBUTE TO EDWARD P. ARCHER

WILLIAM MARSH*

Professor Ed Archer has been a leading figure in labor education in the Midwest for a generation. As a classroom teacher at Indiana University School of Law—Indianapolis, a labor arbitrator for nearly as long, and the co-chair and moving force behind the Annual Labor/Management Relations Seminar cosponsored by the law school and the National Labor Relations Board for twenty years, Ed Archer strongly influenced labor relations and labor law in Indiana and the region. Professor Archer joined the faculty of the law school in 1968 after serving as a legal assistant to a member of the National Labor Relations Board, practicing labor law at Foley & Lardner in Milwaukee, Wisconsin, and teaching legal writing at the University of Michigan Law School.

During his career, Professor Archer was first and foremost a teacher. For most of his tenure at the law school, Professor Archer was the only member of the faculty who taught labor law. An Indianapolis labor lawyer said, “Ed was a skilled teacher who intertwined the legal and practical aspects of labor law which made his courses very interesting.”

Professor Archer’s classes and his enthusiasm for labor law led many of his students to pursue a career in labor law, and, when they did, he “championed his students in the job market.” Law students recognized his outstanding teaching by awarding him the Black Cane Award as the most outstanding professor. Some former students, now labor lawyers, recently honored him by designating their \$1000 per semester labor law award as the “Edward P. Archer Labor Law Award.” In retirement, Professor Archer continues to teach fifth grade students whom he tutors in math at Indianapolis Public School No. 43.

The Annual Labor/Management Relations Seminar has brought the law school and the labor relations community together for the past twenty years. Each year approximately 600 lawyers, union leaders, business executives, and government officials meet for a day-long seminar in Indianapolis. In addition to helping participants keep abreast of developments in labor law and providing an opportunity for these diverse groups to meet and discuss topics of mutual interest, the seminar was a free educational opportunity for law students and raised money for law school scholarships for disadvantaged law students. Professor Archer was instrumental in beginning the seminar and organized it each year with yeoman support from his long-time assistant, Joyce Sanders.

Ed Archer is widely recognized as one of the leading arbitrators in the Midwest; his work respected by litigants and lawyers on both sides of the labor law divide. “His even-keeled temperament at arbitration hearings and thoughtful approach in his decisions cause him to be sought out,” according to a former student of Professor Archer’s who has been a labor lawyer in Indianapolis for twenty-five years. Professor Archer has been a member of the National Academy of Arbitrators since 1979; he is a charter member of the Society of Professionals

* Professor Emeritus, Indiana University School of Law—Indianapolis; former federal defender for the U.S. District Court for the Southern District of Indiana. B.S., 1965; J.D., 1968, University of Nebraska.

in Dispute Resolution; and he is a member of the Federal Mediation and Conciliation Service Arbitrators Panel.

Professor Archer, a native of Baltimore, Maryland, was awarded a bachelor's degree of mechanical engineering from Rensselaer Polytechnic Institute in 1958, and received J.D. (1962) and LL.M. (1964) degrees from the Georgetown Law Center. He and his wife, Judith, were married in 1958; they have three children and six grandchildren.

"If I had to sum Ed up in one sentence," a senior labor lawyer said, "it would be: an exceptional teacher and wonderful person who left his imprint on many a law student who became a successful lawyer."

THE WAY FORWARD:

LESSONS FROM THE NATIONAL SYMPOSIUM ON JUDICIAL CAMPAIGN CONDUCT AND THE FIRST AMENDMENT

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I. PREAMBLE

A. *Preface*

A National Symposium on Judicial Campaign Conduct and the First Amendment took place on November 9-10, 2001. Indiana Chief Justice Randall Shepard chaired the Symposium under the general direction of a steering committee consisting of Chief Justices Shirley Abrahamson of Wisconsin, Norman Fletcher of Georgia, Thomas Moyer of Ohio, Thomas Phillips of Texas, and Judge (and former Chief Justice) William Ray Price of the Missouri Supreme Court.

Two problems shown to be acute in recent judicial elections motivated the gathering. First, several court decisions over the last decade have limited the scope of the ethical canons that have traditionally regulated judicial candidate conduct. Second, unprecedented levels of participation by non-candidates in judicial campaigns threaten the extent to which judicial elections are different from races for legislative and executive positions. The relationship between these two problems, and the complexity of each, are the reasons for this Symposium.

This document records the deliberations at the Symposium and the four guiding principles and eight recommendations for action distilled by the steering committee from those deliberations.

B. The Symposium

The Symposium was a continuation of efforts by state judicial leaders and others to improve the process by which state judges are selected. The Symposium was recommended in the *Call To Action* issued in January 2001, after the December 2000 National Summit on Improving Judicial Selection, convened by seventeen state chief justices. The recommendation noted the above problems and urged that: "Canons of judicial conduct and state laws regarding judicial campaign activity should be reexamined to assure that they promote fair elections while safeguarding the right to free speech." The *Call To Action* also specified that the Symposium should include discussion of creative ways, consistent with the right of free speech, in which state rules as to contribution limits and financial disclosure can be applied to outside groups and individuals as well as candidates and political parties. Clarification of those issues was seen as a prerequisite to fundamental reform of the judicial election process. The task of advancing that goal was assigned to a Symposium of "distinguished scholars, lawyers and judges."

The steering group of state chief justices guided preparation of the Symposium with the cooperation of Professor Roy Schotland of Georgetown University Law Center. The Symposium was organized by the National Center for State Courts.

Attending the Symposium were seventy-five state chief justices, other judges, legislators, law professors and other constitutional law experts, lawyers, political scientists, and others concerned with the relevant issues. Participants represented a broad spectrum of views and interests revolving around judicial campaign conduct and the First Amendment.

Despite the weight and complexity of the issues addressed, the focus was practical. Participants sought to fine-tune existing methods and devise others that, without infringing on the First Amendment, ensure that judicial campaign activity does not compromise the people's right to an impartial judiciary.

Four main themes were addressed at the Symposium:

- *The implications for the Canons of recent First Amendment decisions*
- *Constitutional issues in disclosure of interest group activities*
- *Judicial campaign conduct committees*
- *What conditions, if any, might be attached to public funds or publicly funded benefits for judicial candidates*

The Symposium followed a dual track, with the key topics being debated in both plenary and small working-group discussions. Over two days, participants attended ten plenary sessions and three working group meetings. The sessions were informed by briefing papers and by comments on those papers circulated in advance of the Symposium.

C. The Changing Environment of Judicial Campaigns

The Symposium deliberations were prefaced by a review of the role television advertisements played in the 2000 judicial elections. Experts Anthony Champagne (Professor of Political Science, University of Texas-Dallas) and Shanto Iyengar (Professor of Political Science, Stanford University) identified a number of trends:

- In the 2000 elections, non-candidates as well as candidates were heavily involved in broadcasting judicial campaign ads.
- Television ads appear to be effective in influencing voters at least in the short-term. The long-run effect is likely to be greater voter apathy.
- More than half of the ads were run by outside interest groups, who were more likely than candidates to run hard-hitting attack ads.
- Such ads are on the rise because of changes in campaigns generally and because of the escalation in use of political consultants who import the tactics used in legislative and executive campaigns.

The growing prominence of television advertising is associated with a sharp rise in judicial campaign spending. Spending in the 2000 judicial elections for supreme court positions was sixty percent higher than ever before, with sharply higher records set in ten of the twenty states with supreme court contests. The average funds per judgeship in 2000 nearly doubled the average for the 1990s and was sixty-two percent higher than the average in 1998.¹ Although all elections' campaign spending has increased for years, no other category of elections has ever seen as sharp or as sudden a change as that recorded in judicial elections.

II. THE WAY FORWARD: FOUR PRINCIPLES AND EIGHT RECOMMENDATIONS

The purpose of the Symposium was to identify constitutionally permissible and feasible opportunities to improve judicial election campaigns so as to assure protection of judicial impartiality and public confidence in that impartiality. While some participants expressed dissent to or disagreement with some of what is set forth below, the steering committee believes the following four principles and the eight recommendations are consistent with the views of most judicial and other Symposium participants. No individual statements of concurrence or dissent are set forth. The recommendations have not been endorsed by the Conference of Chief Justices or any other organization.

Although it is not the purpose of this report to fully record the various and

1. The average candidates' funds per supreme court judgeship in 2000 was \$995,999 (forty-six judgeships); the prior peak national total was in 1998, \$27,842,016 (nineteen states), with an average of \$618,711 (forty-five judgeships). These figures exclude candidates who raised no funds. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 1, 2 n.6.

diverse views expressed at the Symposium, the working group discussion reports, noting points of agreement and disagreement, are available upon request.

A. Principles

Principle 1: Judicial elections are different from other elections because of the differences between the role of judges and the role of other elective officials. At least three fundamental characteristics make the judicial role unique.

First, in judicial processes, due process rights and the rule of law predominate; in contrast, in legislative and executive processes, the rights of association, assembly, and petition govern. The exercise of those latter rights produces the political organizing, pluralist struggle and compromise that characterize the political branches.

Second, the separation of powers doctrine yields three different kinds of relationships between the electorate and decision-makers: (a) legislative, with dispersed power and representing diverse constituencies, the body that is most directly accountable and responsive; (b) executive, with centralized power responsible to the broadest constituency; and (c) judicial, the body that is most insulated and least accountable, therefore responsible for the most principled decision-making.²

Third, the state constitutional history of judicial elections shows that such elections were initiated only in part to give popular control—and even then, care was taken to constrain elections. States that have judicial elections also have constitutional provisions that are unique to the judiciary.

Principle 2: There is a compelling need to ensure that judicial campaigns remain different. In the American political system, government would never regulate legislative or executive candidate speech. Indeed, campaign speech is part of a constant open, public, and unrestrained debate to shape policy. But communication with judges about the decisions they will make is limited to the

2. In sixteen of the thirty-nine states with an elective judiciary, elections are retention-only following judicial appointment and in three more, retention-only after election. In all elective states but one, judges have longer terms than any other elective officials (in Nebraska, the university regents have similar terms). Of appellate judges, thirty-eight percent have terms of ten years; another sixteen percent serve eight-year terms; of trial judges, thirteen percent serve ten-year terms and another sixty-two percent serve six years. In addition to this very long-standing and widespread constitutional structure, even when judges do face contestable elections, about half are not contested and even when there are contests, few are competitive.

In addition to the differences noted above, most elective states combine judicial elections with constitutional provisions, unique to the judiciary, that emphasize how different judges are from other elective officials: e.g., in thirty-seven of the thirty-nine elective states, only judges are subject to both impeachment and special disciplinary process; in thirty-three, only judges must meet training or experience requirements (except that ten states require the same of the attorney general); in twenty-three, only judicial nominations go through nominating commissions, even for interim appointments in six; and in eighteen, only judges cannot run for nonjudicial office without first resigning.

most structured mode of communication we know: evidence, briefs, arguments, and limits on *ex parte* contact.

Principle 3: That some judicial campaign speech can and should be regulated does not mean that all can or should be regulated. Therefore, there is a need for a thorough revisiting, by scholars and practitioners of broad and diverse representation and perspectives, of the limits on judicial campaign speech.

Principle 4: Efforts to ensure that judicial campaigns remain different depend ultimately on the success of steps to assure candidate professionalism and to strengthen the norms and culture that enable judicial elections to fulfill their proper role in the balance of electoral accountability and judicial independence.

The Canons, campaign conduct oversight committees, education of candidates and of the press, etc. all draw upon the deepest traditions of the role of the courts and of the bar. Political campaigning places most judicial candidates in unfamiliar situations, and involves challenging time pressures and incentives. The goal is to strengthen the norms and the culture of judicial campaigns so as to protect the ability of state courts to meet their responsibilities in our federal system and under the rule of law.

B. Recommendations

Based on the briefing papers, plenary discussions, working group deliberations, and the preceding principles, the steering committee of state chief justices concludes and recommends:

1. Judicial campaign conduct by candidates can be constrained. Some current provisions aimed at such constraint may warrant reconsideration. Therefore, we urge the Conference of Chief Justices to work with the American Bar Association to reexamine Canon 5 in light of the recent court decisions, and in light of the papers produced by scholars for this Symposium.

We find that the need to prevent unrestrained judicial campaign conduct is a compelling public interest; that the necessity of restraint is strongest where the statements commit or appear to commit a candidate with respect to cases or controversies that are likely to come before the courts; that the necessity does not extend to speech that is merely undignified or misleading; and that the terms of the Canon should draw lines between proscribed and permitted speech as clearly as possible.

2. Any court that must decide a case involving constraints on judicial campaign conduct should take into account both that the foremost duty of a legal system is to render justice with due process and that our courts have the unique responsibility of impartial decision-making based on the rule of law. America's system of justice depends on state and federal

courts that possess and appear to possess the ability, integrity, impartiality, and public confidence that are indispensable to rendering justice.

3. Courts in deciding cases or formulating Canon provisions, and legislatures, bar associations, disciplinary bodies, and others who become involved in formulating or applying constraints on judicial campaign conduct, should take into account the purpose for such constraints, and should take special care to avoid applying constraints to conduct that may be distasteful but whose restraint is not necessary to achieve the desired purpose.
4. Judicial campaign conduct by non-candidates is not subject to similar constraints because of values of free speech and free association embodied in the First Amendment. However, we believe that there is a compelling public interest in narrowly-tailored disclosure to assure that when major campaign efforts are mounted with large sums of money, the public is informed as to the identity of the large contributors. To be clear: we encourage the broadest possible participation by all manner of interest groups in the judicial election process. The problem we address is the confusion that unattributed advertisements sow. Voters need the information disclosure provides to intelligently evaluate claims and counterclaims made by participants other than the candidates themselves, and to distinguish the views of such participants, which tend to promote candidates as likely to behave a certain way if elected.

Further, without such disclosure the efforts to prevent excessive campaign contributions that are made in many states' statutes, and that are the subject of 1999 amendments to the Model Code of Judicial Conduct, could be evaded. Any such evasion of disclosure is directly contrary to not only the very reasons for contribution limits, but also the reasons for disqualification of judges if contributions exceed prescribed limits. Thus, any such evasion jeopardizes, at the very least, public confidence in the judiciary

We stress that the variety of campaign spending practices experienced in different jurisdictions calls for different spending levels to "trigger" disclosure requirements. Also, on the question of what trigger levels will protect constitutional values of free association and unchilled speech, advice should be secured from practitioners, the public, and scholars who are experts on campaign finance law, and all of whom represent a diversity of views. Taking into account such advice and the differences among jurisdictions (their size, history, and political culture), we recommend state legislation or court rules providing that if an effort (or associated efforts) in a judicial campaign involves spending more than a prescribed dollar amount (this might be \$10,000 or \$25,000), then

the sponsor should disclose the sum spent and the names and substantial amounts contributed by any entity that gave over a prescribed amount (this might be \$10,000) and any individual who gave over a prescribed amount (this might be \$5,000)

5. We recommend establishment of both official and unofficial campaign conduct processes to help assure appropriate campaign conduct.

Official disciplinary processes are needed for instances of clear abuse or substantial charges of abuse. (That may be a single process for all judicial candidates, both incumbent judges and others; or it may be one process for judges and a different one for lawyer-candidates. If there are separate processes, we recommend that every effort be made to coordinate both procedures and criteria used for evaluating campaign conduct.)

At the same time, non-official citizens' committees can be very effective. Jurisdictions might consider the Ohio Supreme Court rule providing that its official disciplinary process will defer, when feasible, to non-official committees, in matters involving judicial campaign conduct.

Non-official campaign conduct committees are particularly well-positioned to help assure appropriate judicial campaign conduct. If inappropriate conduct occurs and corrective efforts fail, such committees have the independence and prestige to explain to the public why, in judicial elections, "win at any cost" campaigns damage our courts' ability to render justice.

We further recommend that non-lawyers be included as members of conduct committees and that retired but not sitting judges be included.

In issuing these recommendations, we urge all jurisdictions to consider the steps Illinois and New York have taken to build unofficial or quasi-official mechanisms for monitoring and responding to improper campaign conduct.

Illinois has charted a path to positive change that relies on the application of more speech and more resources for candidates, their supporters, and the voting public. The sponsoring body, the Judicial Advisory Council (JAC), is empowered by state statute and Cook County ordinance to make recommendations to effect improvement to the administration of justice in Illinois. The JAC's Task Force on Illinois Judicial Elections is an unofficial body that seeks to persuade candidates voluntarily to raise the level of campaign conduct.

In New York, the Administrative Board of the Courts last year amended

the Code of Professional Responsibility to make clear that lawyer-candidates for the bench are subject to the same ethical rules as sitting judges; and adopted a resolution supporting the creation of conduct committees.³ The Board went on to urge local bar associations to attend a statewide convocation to implement this goal. Such convocations were held in October 2001 and February 2002. A special committee of the state bar has issued a sixteen-page guide, and committees have been formed in many of the largest counties.

6. Since early 2000, when work began on the seventeen Chief Justices' Summit on Judicial Selection and continuing with this Symposium, the problems posed by judicial elections have drawn unprecedentedly active attention from the Conference of Chief Justices.

We urge that each supreme court designate a "point person" (justice, judge, lawyer or layperson) on judicial elections, for two reasons: to help encourage and support implementation of these recommendations and the Summit's recommendations in the January 2001 *Call To Action*; and to serve an information clearinghouse function to take advantage of the fact that different states take different approaches. All states will benefit from having a network of people who are particularly knowledgeable about the problems of judicial elections in general, and their own state's experience in particular.

7. We agree with and re-adopt the recommendation of the *Call To Action* produced after the December 2000 Summit, that "state and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters," and that "Congress should provide a free federal mailing frank" for such voter guides.

The four West Coast states have, for generations, sent "Voters' Guides" to all registered voters. Voters' guides have proven effective in ensuring that voters are informed about judicial candidates.

8. We also agree with and re-adopt the other pertinent recommendations of the *Call To Action*:

— "Educational programs . . . should be conducted for all judicial candidates, together with their campaign staff, consultants, and

3. Chief Administrative Judge Jonathan Lippman wrote that these actions were a direct "respon[se] to the [Summit's] Call To Action." Jonathan Lippman, *Electing Judges Should Be More Dignified*, N.Y.L.J., Jan. 22, 2002, SB1, SB6. Detailed reports on developments in Illinois and New York are available on request to the National Center for State Courts.

interested family members. The legislature or judiciary, as appropriate, should mandate attendance at such programs and ensure that they are adequately funded.”

- “‘Hotlines’ should be established . . . to respond expeditiously to questions about campaign conduct”

C. Conclusion

By “meeting speech with more speech” and by providing voters with additional information, we will enhance First Amendment values and protect the ability of state courts to render justice. If we fail to meet the challenge that is posed by recent developments in judicial elections, we risk severe erosion of the role of state courts in the American system of justice, and of the rule of law.

MYTH, REALITY PAST AND PRESENT, AND JUDICIAL ELECTIONS

ROY A. SCHOTLAND*

[T]here are particular moments in public affairs when the people . . . [are] misled by the artful misrepresentations of interested men What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.¹

The republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.²

Why do we have judicial elections? A democracy without elections for the legislature and executive (or, in parliamentary systems, for the executive as the leadership of the elected legislators), would be simply inconceivable. But no one would deny that eleven of our states, or many other nations, are democracies even though they do not elect judges.³

It *might* follow from that irrefutable, fundamental difference between elections for judges and for other offices, that judicial elections should not—or more to the point, need not—be conducted the same as other elections. Before we soar into debate, let us lay a foundation with elements of fact: first, the historical facts about why we have judicial elections; second, how well or poorly those facts—that is, the very *purpose* of having judicial elections—have been taken into account by the courts that have stricken efforts to treat judicial elections differently.

I. THE HISTORICAL FACTS

Given that judicial elections are not a *sine qua non* of democracy, it is not surprising that they were chosen not simply to increase popular control, but to free the judiciary from domination by the other branches, and to enhance the

* Professor, Georgetown University Law Center. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. THE FEDERALIST No. 63 (James Madison) (Clinton Rossiter ed., 1961).

2. THE FEDERALIST No. 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. In seven states, no judges face elections (Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Virginia); in four, probate and/or family court judges are elected (Connecticut, Maine, South Carolina, and Vermont).

caliber of the bench and the profession. However, rather than being controlled by a populist movement at the constitutional conventions, the issue of judicial elections was controlled by moderate lawyer delegates. Their move for judicial elections was *by no means* an effort to make the judiciary like the other branches, but instead, an effort to elevate the judiciary and make it more independent of other branches so that it could better render justice.

To infer from the decision to have elections that with that choice came an abandonment of the role and function of the judiciary is sheer error. The Seventh Circuit has memorably corrected that error:

Two principles are in conflict and must, to the extent possible, be reconciled. Candidates for public office should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others. The roots of both principles lie deep in our constitutional heritage. Justice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time. Whatever their respective pedigrees, only a fanatic would suppose that one of the principles should give way completely to the other—that the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases or that the principle of impartial legal justice should be held to prevent a candidate for such office from furnishing any information or opinion to the electorate beyond his name, rank, and serial number. We do not understand the plaintiffs to be arguing that because Illinois has decided to make judicial office mainly elective rather than (as in the federal system) wholly appointive, it has in effect redefined judges as legislators or executive-branch officials.⁴

4. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227-28 (7th Cir. 1993) (holding the Illinois limitation overbroad). Judge Posner went on to note the danger of "bringing the case within the orbit of *Brown v. Hartlage*, 456 U.S. 45 (1982)," *id.* at 228, the ill-fitting case that, as Professor O'Neil stresses in his Paper, so many courts have so unthinkingly applied to judicial election problems. See generally Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

Posner added this:

Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech. Further we need not go since the plaintiffs do not argue that the State of Illinois is constitutionally prohibited from placing greater restrictions on the campaign utterances of judicial candidates than on the campaign utterances of candidates for other types of public office.

Buckley, 997 F.2d at 228.

On the history, for brevity I quote directly from the leading source, which has held up unaltered by later treatments.

By 1860, twenty-one of our thirty States elected judges. Since 1846, twenty-one states had constitutional conventions, nineteen of which chose elections, with only Massachusetts and New Hampshire holding out.⁵

Scholars have given two explanations of the move to elections. First, "that emotion prevailed over reason . . . an unthinking 'emotional response' rooted in . . . Jacksonian Democracy. This view assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control."⁶ Second, that "[p]olitical 'outs' maneuvered to strip partisan opponents of valuable patronage."⁷ But in fact, Hall's research into the constitutional convention histories found that, "delegates from across the ideological spectrum criticized the party-directed distribution of these offices whether by the executive or the legislative branch. . . . Moderates . . . reflected the belief of many . . . writers that partisanship could never be eliminated, [but they believed] it could be controlled."⁸

Hall further explains:

[Scholars have] ignore[d] the overwhelming role of lawyer-delegates in the conventions. In every convention, lawyers and judges of both parties, for whom the method of judicial selection had personal and professional significance, controlled the committees on the judiciary. They also dominated debate over the issue once it reached the full conventions. . . . In only five conventions did the issue of popular election prove sufficiently controversial to require a roll-call vote before adoption . . . Moderates . . . promoted consensus within the conventions through innovative arguments that stressed the positive effects of popular election on the exercise of judicial power. At the same time, they calmed conservative fears by developing constitutional devices that blunted the full impact of popular will on the judiciary.

Moderates were more than conciliators of ideological opponents. Rather, these lawyer-delegates had a positive agenda This agenda included a more efficient administration of justice, an increase in the status of the bench and bar, an end to the penetration of partisan politics into the selection process, and increased independence and power for appellate and, to a lesser extent, for trial court judges.

A breakdown in the administration of justice in the appellate and inferior courts lent urgency to the constitutional reform movement. . . . In the late 1840s litigants appealing civil cases to the Indiana Supreme Court often suffered delays of four years before the court could hear

5. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary*, 45 *THE HISTORIAN* 337, 337-38 (1983).

6. *Id.* at 338-39.

7. *Id.* at 339.

8. *Id.* at 346-47.

their suits

Moderates claimed that popular election complemented proposals to restructure the courts [and would also bring] a centralized judicial structure and reduction in costs of court administration [and] a means of stimulating greater productivity on the bench Moderates concluded that the profession had nothing to lose and everything to gain by greater openness in the selection process. Popular election would both enhance the prestige of the legal profession and make the bench more receptive to the demands of the legal profession for a simpler scheme of justice. Moderates insisted that popularly elected judges were more likely than appointed judges to implement reforms in pleading and procedure—reforms that moderate lawyers viewed as essential to the future of the profession. As . . . Bishop Perkins of New York explained to his fellow lawyers, appointed judges too frequently were “mere legal monks, always poring over cases and antique tomes of learning.” Moderates, therefore, endorsed popular election as a means to an able, respected, and enlightened judiciary. This, in turn, promised wider respect for the legal profession. . . . “The judiciary are so weak,” Abner Keyes informed the Massachusetts convention, because “they must depend on the legislative branch for their appointments and to make the laws. Elect your judges,” Keyes continued, “and you will energize them, and make them independent, and put them on a par with the other branches of government.” Moderates echoed these conclusions in New York, Illinois, Indiana, Kentucky, Ohio, Maryland, and Virginia

Moderates built consensus among delegates by adopting constitutional devices that limited the potentially disruptive consequences of popular election. They made elected judges ineligible for other offices during the term for which they were elected, required staggered elections of appellate judges, [and] provided that appellate judges be elected in circuits or districts rather than in at-large state elections By making judges ineligible for other offices, moderates prevented sitting judges from using their decision-making powers to campaign for other posts. Staggered terms, as one Indiana delegate observed, ensured that there could be no “revolution in law based on party feeling.” . . . Moderates also resisted radical demands for short terms of office for appeals court judges. They argued successfully that lawyers of ability would resist appellate court service if the terms were too short.⁹

The last note is a major one: the whole goal of judicial selection is to find ways to make it more likely that “lawyers of ability” and, as we would add today, of appropriate temperament, will seek to serve on the bench.

9. *Id.* at 342-47, 350, 352 (citations omitted).

II. "AN ELECTION IS AN ELECTION IS AN ELECTION": THE MANTRA THAT PASSED FOR ANALYSIS IN THE DECISIONS LIMITING CANON PROVISIONS

In *ACLU v. Florida Bar*, the court stated,

[W]hen a state decides that its trial judges are to be popularly elected, as Florida has done, it must recognize the candidates' right to make campaign speeches *and* the concomitant right of the public to be informed about the judicial candidates.

. . . [I]n a different yet related context [the only other context this judge noted], many states once imposed a complete ban on attorney advertising . . . To be sure, this case is different from the attorney advertising cases. Nonetheless, the lessons to be learned from those cases can provide some insight here. . . . [H]ere, as in the advertising arena, the state underestimates the ability of the public to place the information in its proper perspective.¹⁰

The *ACLU v. Florida Bar* judge saw only a single "compelling state interest," which it described as "the maintenance of public confidence in the objectivity of its judiciary."¹¹

Four days after that decision (by coincidence), the Ninth Circuit *en banc* held that California could not ban political party endorsements for nonpartisan judicial candidates in a county's official voter pamphlet.¹² Judge Reinhardt, in a separate concurrence joined by Judge Kozinski, said this:

True, [justices campaigning for retention] could have kept silent—but if the people of the state want elections for judges, they must also want a fair and full debate on the issues. . . . The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known. . . . If the people are to be given the right to choose their judges directly, they are free, rightly or wrongly, to consider the political philosophy of the candidates. They are even free, rightly or wrongly, to consider how the candidates may vote on important issues of public concern, such as abortion, capital punishment, affirmative action, gun control, and religious freedom, to name just a few. One would have to be exceedingly naive not to be aware that a judge's judicial philosophy may influence his or her votes on important public issues that come before the court, particularly the state or federal supreme court. Whether a judicial candidate wishes to make his views known on those issues during the electoral process is another matter. So is the question whether it is proper for him to do so. But those are all

10. *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097-99 (D. Fla. 1990) (emphasis in original).

11. *Id.* at 1097.

12. *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990).

problems inherent in California's decision to conduct judicial elections. If California wishes to elect its judges, it must allow free speech to prevail in the election process. . . .

Of course, the citizens of California have a choice. . . . California could, like the federal government, provide for the appointment of judges for life—at some or all levels of its judiciary.¹³

Six months later, the Supreme Court of Kentucky directly followed the ruling from *ACLU* and found that one of its state judicial canons contained unduly broad speech limits.¹⁴

Four months after Kentucky's *J.C.D.C.* decision, the Ninth Circuit was followed flatly by a federal district court—this time, to strike a limit on campaign advocacy on disputed legal or political issues, including a candidate's "philosophical views on criminal sentencing and the rights of victims of crime [and] how he would apply [the 'reasonable doubt'] standard. . . ."¹⁵ The Third Circuit reversed the lower court's decision, including the following point—notable because it is so unusual: "The fact that a state chooses to select its judges by popular election, while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly."¹⁶

By 1997, Kentucky's canon had been revised and its supreme court revisited the matter in *Summe v. Judicial Retirement and Removal Commission*,¹⁷ dealing with an interesting example of "the artful misrepresentation of interested" people and upholding a finding of misrepresentation.¹⁸ The candidate being disciplined had distributed over 5000 copies of the "Kenton County Citizen's Courier," with an "article" about child abuse and a "letter to the editor" noting the candidate's concern about crime.¹⁹ However, the "Citizen's Courier" was a campaign flyer, not a newspaper. The newspaper format was "commonly used in elections in Kenton County"²⁰—but unlike the use in *Summe*, was always clearly marked as campaign material, and had not been used in judicial campaigns.

Dissenting from disciplining the candidate, one judge perfectly put forward the simplistic approach:

[This candidate] entered the rough and tumble world of Kentucky electoral politics and was successful in unseating a recently gubernatorially appointed incumbent circuit judge She ran a good campaign against a tough opponent and was popularly elected by the

13. *Id.* at 291-96.

14. *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991).

15. *Stretton v. Disciplinary Bd. of the Supreme Court*, 763 F. Supp. 128, 131 (E.D. Pa.), *rev'd*, 944 F.2d 137 (3d Cir. 1991).

16. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991).

17. 947 S.W.2d 42 (Ky. 1997).

18. *Id.* at 48.

19. *Id.* at 44.

20. *Id.* at 45.

Kenton County voters. In Kentucky, both the law and tradition allow judicial candidates, like all other candidates in political elections, to be guided by the rules of the Marquis de Sade as long as they tell the truth. Idealists would restrict judicial candidates to the rules of the Marquis de Queensbury.²¹

Just last year, a Pennsylvania court stated:

Finally, we believe it is important to point out that the people of Pennsylvania have provided that we shall elect our judges, just as we do our legislators and executives. While it is true that in some circumstances we hold our judges to different—and often more exacting—standards than we do other public officials, we have chosen a method of judicial selection which takes place in the arena in which the First Amendment affords its broadest protection. That a candidate seeks judicial office does not diminish the nature or scope of that protection. Any difference between the offices sought bears only on the nature of the state's interest, in regulating a candidate's speech. To hold otherwise would open the floodgates for the electoral decisions of our citizens to be tarnished²²

Finally, earlier this year, Judge Beam, dissenting from the Eighth Circuit's decision in *Republican Party of Minnesota v. Kelly* upholding Minnesota's choice of nonpartisan judicial elections, stated: "[S]ince [it was] first permitted to select its own judiciary, Minnesota has consistently favored electorally-responsive judges."²³ Later in that opinion, the concern for judicial independence, and the recognition that "rightly so, . . . judges fundamentally differ from other elected officials," were both dismissed as "policy notions [sic]" that "cannot trump constitutionally-enshrined rights."²⁴

Due process was not mentioned at all. But this is so plainly "a case where constitutionally protected interests lie on both sides of the legal equation," as Justice Breyer recently said.²⁵ Referring to constitutional "rights," without even mentioning due process, is stunning shallowness.

CONCLUSION

To treat a judicial election the same or essentially the same as other elections, is to ignore a number of vital and important factors.

First, the due process rights of litigants to impartial, open-minded judges, and the public's right to have a judiciary able to render justice is imperative. Second,

21. *Id.* at 48-49.

22. *In re Miller*, 759 A.2d 455, 470-71 (Pa. Court of Judicial Discipline 2000).

23. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 890 (8th Cir.) (Beam, J., dissenting), *cert. granted*, 112 S. Ct. 643 (2001).

24. *Id.* at 891.

25. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

as Robert Bauer brings out,²⁶ the public has a right to have judges function differently from other elected officials in order to preserve the role of the judiciary in our system of checks and balances. Third, the history of why we chose to have judicial elections did not include any disregard for, let alone readiness to undermine, the core values of a system of checks and balances. Rather, the purpose of having judicial elections was intended to secure independence for the judiciary, to insulate the judiciary from partisan politics and control, to improve the judges' performance and administration, and thus, to elevate the bench, the profession, and public confidence in the judicial system. Those purposes are the reasons for state constitutional provisions unique to the judiciary on length of terms, protection against reduction in pay, limits on running for other offices, how vacancies are filled, and disciplinary processes.

Finally, it is not only the *speech* of judicial candidates that we have, for decades, treated in ways that would be inconceivable in other elections. For example, in all but four of the thirty-nine states with judicial elections, a legally binding canon bars personal fundraising and requires that all fundraising be done by the candidate's campaign committee in order to at least reduce the candidate's involvement in fundraising.²⁷ Can you imagine similarly limiting candidates in other elections? Likewise, in at least twenty-four states, the law limits the time period during which fundraising is permitted, both before and after the election.²⁸ Again, such limits would be unimaginable for other elections, except possibly for barring legislators from raising funds during legislature sessions.

Therefore, in almost every state with judicial elections, campaigning has been subject to special treatment for decades.

Our Symposium cannot overlook how easy it is to draw a line to separate the "election-related activities" of judicial candidates from their other activities, compared to trying to draw any such line for, say, legislative candidates.²⁹

26. Robert F. Bauer, *Thoughts on the Democratic Basis for Restrictions on Judicial Campaign Speech*, 35 IND. L. REV. 747 (2002).

27. The four states are California, Idaho, Nevada, and Texas. AMERICAN BAR ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER'S POLITICAL CONTRIBUTIONS, PART TWO, at 41 n.73 (1998).

28. The pre-election window is one year in five states and shorter in eleven states, and the post-election window is six months or shorter in nineteen states. *Id.* at 48 n.82. Once again, a Florida federal judge stands alone, striking such a limitation as contrary to the First Amendment rights of candidates to solicit, of supporters to associate, and of voters to receive information. See *Zeller v. Fla. Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995). For a contrary decision which *Zeller* found ill-considered, see *In re Code of Judicial Conduct*, 627 S.W.2d 1 (Ark. 1982). See also AMERICAN BAR ASSOCIATION, *supra* note 27, at 48 n.83.

The Task Force is unanimous that the widespread adoption of timing limits like Canon 5 reflects a sound balancing between the need to mount campaigns and the need to protect public confidence in the courts. We believe that the *Zeller* view enlarges all the worst aspects of judicial campaign fundraising

Id.

29. Cf. Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX.

Communication between nonjudicial candidates and the public occurs, *during campaigns and all the rest of the time*, via the same media and messages. Communication to or from judges—except during campaigns—occurs in highly structured and controlled ways—in trials and hearings, via evidence, testimony, arguments, and briefs. True, judges also write articles, give lectures, appear on panels, etc. But judges' communications outside the courtroom—except during campaigns—are almost entirely free of the self-promotion and kinds of advocacy that is garden-variety when other elected officials address the public.

However, *during* campaigns, judges and judicial candidates face the same incentives as other candidates: they want to win. For judges, facing such incentives means departing from the modes of communication with which they are familiar and entering into a new domain—in which many of them feel acute discomfort, and into which they are led more and more often by campaign consultants whose sole incentive is to win.

I urge great care before we cut down the safeguards that have surrounded judicial elections. The safeguards should remain not to reduce accountability or out of paternalism, but to protect the constitutional rights of litigants and—as Robert Bauer adds invaluabley—our courts' unique function in our system of checks and balances.³⁰

Isn't the danger, indeed the strong probability, that the more judicial elections are like other elections, the more we will lose people who would be excellent judges but who view the need for intense campaigning as a severe hurdle? And isn't the whole purpose of judicial selection getting onto the bench the people most suited to be judges?

L. REV. 1751, 1768 (1999) (examining campaign finance concerns and free speech issues in the context of legislative campaigns).

30. See Bauer, *supra* note 26.

TELEVISION ADS IN JUDICIAL CAMPAIGNS

ANTHONY CHAMPAGNE*

INTRODUCTION

Judicial campaigns have gone through a dramatic transformation in recent years from low-key, low-budget, and often uncontested affairs to hotly contested, expensive races that often cannot be distinguished from contests for offices in the political branches.¹ The traditional judicial campaign was "about as exciting as a game of checkers. Played by mail."² The judicial candidate would speak to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications. There were hands to shake, bar and newspaper endorsements to obtain, and little else. While there might be some involvement with interest groups, it usually consisted of speeches before a union local or a medical society and perhaps an effort to obtain their endorsements. Assuming the candidate was an incumbent and had avoided scandal or a highly controversial decision, victory was likely. Indeed, most incumbents would not have an opponent. In a retention election, victory was a virtual certainty. If the race was for an open seat, then an attractive name, a good ballot placement, a popular political party affiliation, or perhaps a newspaper or bar association endorsement, were the avenues to election.³

To the extent that there was interest group involvement, it was mostly between competing segments of the bar and even that involvement was low-budget and low-key. However, this traditional approach to judicial elections began to change in the late 1970s when deputy district attorneys in Los Angeles began to encourage opposition to judges they believed were soft on crime. Shortly thereafter, trial lawyers in Texas began to pour money into that state's supreme court races. Before long, money was flowing into judicial races from the defense side in tort suits as well.⁴ Soon big money was going into judicial

* Professor, Government and Politics, School of Social Sciences, University of Texas at Dallas. B.A., Millsaps College; Ph.D., University of Illinois. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation. I am grateful to the Brennan Center and especially to Craig Holman for providing me with the Brennan Center compilation of ads. I am also grateful to William Quinlan, Monique Anikwue, and Professor Roy Schotland for ads not found in the Brennan Center materials. Finally, I appreciate Chief Justice Tom Phillips' willingness to answer questions about television ads in Texas and John Deardourff's willingness to talk about television ads in several other states.

1. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1393 (2001).

2. William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Justice Race*, MEMPHIS COMMERCIAL APPEAL, Oct. 29, 2000, at DS1.

3. Champagne, *supra* note 1, at 1393.

4. Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 69-70; Alexander Wohl,

campaigns in states such as Alabama, California, Kentucky, Michigan, Montana, Ohio, Pennsylvania, Wisconsin, and Illinois.⁵

In this new era of judicial politics, judicial campaigns have become “nastier, noisier, and costlier.”⁶ Television has become the major venue for modern day supreme court campaigns.⁷ The increased fundraising of candidates has, to a great extent, gone into campaign ads on television. Independent expenditures and issue ads by interest groups have also increased and much of that money has also gone into television.⁸ With the average American family’s television tuned in for eight hours per day,⁹ television has become the most effective, albeit expensive, way for judicial candidates to reach voters. To date there has been no empirical study of this use of television in judicial campaigns. This Paper seeks to analyze the television messages of state supreme court candidates in Ohio, Michigan, Alabama, and Mississippi in the 2000 elections. It seeks to determine the themes of judicial campaign ads and the varying messages from candidate—sponsored, party-sponsored, and interest group-sponsored ads.

Justice for Rent, AM. PROSPECT, May 22, 2000, at 34.

5. See Champagne, *supra* note 1, at 1394-1404. By the 2000 elections, at least \$62 million was spent on judicial races. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 850-51.

6. Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

7. Television ads did appear in some lower court campaigning as well, but the high expense of these ads made them less frequent in those elections.

8. One of the most significant developments in modern campaigning was the use of independent expenditures. Political action committees and political parties may spend unlimited sums campaigning for or against candidates as long as the committee or party act independently from the candidate’s campaign committee. The model for independent political action committees was the National Conservative Political Action Committee (NCPAC), which spent millions of dollars in pursuit of its moral issue agenda. See Fed. Election Comm’n v. Nat’l Conservative Political Action Comm., 470 U.S. 480 (1985); W. LANCE BENNETT, *THE GOVERNING CRISIS: MEDIA, MONEY, AND MARKETING IN AMERICAN ELECTIONS* 53 (2d ed. 1996).

Many state laws, like federal law, bar corporations and unions from express political advocacy. However, they can engage in “issue advocacy.” That route was of major importance last year, for the first time, in judicial elections. For a discussion of the legal distinction between express advocacy and “issue ads,” a distinction that is more legal than real, see Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755, 759-61 (2002).

Bradley Smith believes that both “issue ads” and independent expenditures “are the direct result of efforts by citizens to engage in political participation in the face of contribution and spending limits.” See BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF FINANCE REFORM* 175 (2001).

9. BENNETT, *supra* note 8, at 15. Indeed, since the mid-1960s, most Americans rely on television as the primary news source. See SMITH, *supra* note 8, at 173.

I. THE IMPORTANCE OF TELEVISION

One of the best examples of the effectiveness of television in judicial campaigns comes from data gathered regarding the Texas Supreme Court races between 1992 and 2000.¹⁰ On four occasions in the last decade, Republican supreme court candidates were challenged in the primary by candidates with little if any organized support and minimal funding. Yet the insurgent candidates all showed great strength in areas where the established candidate did not run television ads. Of course there may be additional explanations for the strength of established candidates in those geographical areas where ads were shown. For example, perhaps the candidates campaigned harder in those areas or were better organized. Moreover, in some locales candidates may have had stronger name identification than their opponents.¹¹ However, as Table 1 indicates, the strong correlation between television media markets and voting percentages should not be ignored.

One would, of course, expect ads to be purchased in the Dallas-Fort Worth and Houston media markets as these areas represent the state's major urban centers and the source of much Republican voting strength. For example, in the 2000 Republican primary for President, 1,126,757 votes were cast. Thirty percent of those votes came from Dallas, Tarrant, and Harris counties, three of the largest counties (but not the only counties) in the Dallas-Fort Worth and Houston media markets. Likewise, some media markets may be ignored because they contain so few Republican voters.¹² Therefore, major considerations regarding the purchase of television time are clearly cost and the ability to reach potential voters in the Republican primary.¹³ The insurgent candidates did not have the resources to run television ads; only the established candidates did and only in some media markets. It was reasonable to conclude that it was the support received by the established candidates in the areas where they ran television ads that led to their victories.

It is important to note that since the data all relate to the Republican primary, the effect of the political party label is controlled. If one compares the

10. See tbl.1. The data were compiled by Texas' Chief Justice Thomas R. Phillips and by Karl Rove (who served as a campaign consultant to a number of winning judicial candidates) and were presented at the Summit on Improving Judicial Selection on December 8-9, 2000 [hereinafter Phillips & Rove]. For further detailed data, see Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1508-12 (2001).

11. Candidates in Texas Supreme Court races are affected by "friends and neighbors" voting where voters tend to cast ballots for candidates from their home county or from neighboring counties. Gregory S. Thielemann, *Local Advantage in Campaign Financing: Friends, Neighbors, and Their Money in Texas Supreme Court Elections*, 55 J. POL. 472 (1993).

12. See Texas Secretary of State, Historical Data, at www.sos.state.tx.us/elections/historical/index.shtml.

13. Telephone Interview with Thomas R. Phillips, Texas Supreme Court Chief Justice (Aug. 15, 2001) (transcript on file with author); Telephone Interview with John Deardourff, media director (Aug. 20, 2001) (transcript on file with author) [hereinafter Deardourff Interview].

percentage difference in votes for the established candidate in those areas where television buys were made versus those media markets where no buys were made, the difference is remarkable.¹⁴ In media markets where the established candidates ran television ads, in terms of vote percentages, they received between twelve percent and 18.5% more votes than in media markets where they did not buy television time.¹⁵

The media markets where these differences were found vary considerably in size, representing huge markets such as Houston and Dallas-Fort Worth to much smaller markets such as Abilene-Sweetwater, Corpus Christi, and Lubbock. Thus, the differences in victory margins between the areas where media buys were made and where they are not was not fully explained by the urbanism of the media markets (though the largest markets, Dallas-Fort Worth and Houston have the most Republican voters and so media buys there were essential). Examination of individual media markets showed a pattern of success for established candidates in areas where ads were purchased.¹⁶ In the four primaries examined in Table 1, there were thirty-eight media markets where the candidate purchased television advertising. The established candidate won at least a majority in thirty-five of those thirty-eight media markets.¹⁷ In thirty-seven media markets, a candidate did not purchase television time and the established candidate won at least a majority in only eleven of those markets.¹⁸

Given the myriad of factors that can explain electoral success, one should be careful to impute victory in these judicial races solely to television ads. On the other hand, the general pattern of high margins of victory in areas where television was used is so powerful that it cannot be ignored.

II. THE NATURE OF THE MEDIUM

Television encourages the use of dramatic and eye-catching political advertisements. In the context of judicial races, such ads include the use of talking trees,¹⁹ exploded tires and overturned vehicles,²⁰ accusations that a candidate is pro-crime (one of the more eye-catching is that the candidate is soft on pedophiles)²¹ and accusations that judges are corrupted by campaign money.²²

14. See tbl.1.

15. *Id.*

16. See Phillips & Rove, *supra* note 10.

17. *Id.*

18. *Id.*

19. Ads used in Michigan included talking trees, one of which was named "Don Oak."

20. The problems with Firestone tires were noted in judicial campaign ads in Michigan and in Alabama.

21. Being "tough on crime" was a campaign theme found in all four states (Alabama, Michigan, Mississippi, and Ohio). Michigan had an ad that stressed a challenger's decision as an intermediate appellate judge that was favorable to a child molester. A similar charge was made against a Wisconsin justice. The grandmother of a murdered child appeared in that ad. See Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV.

As Ansolabehere, Behr, and Iyengar point out:

More often than not, the victor is the candidate who is best able to condense his or her message into something that the average voter—who is far removed from politics, and usually hates commercials—will remember and care about. Out of necessity, such circumstances force candidates to highlight easily absorbed negative messages about the opponent.²³

The judicial elections of 2000 in the four states studied in this Paper confirmed this theory. Candidates used themes such as crime control, civil justice, and family values to offer voters an appealing message that would attract votes. They also used aspects of their ads as signals of their underlying attitudes and values. Further, they attacked their opponents by portraying them as corrupted by campaign contributions, the tools of special interests, and soft on crime.

Additionally, the 2000 judicial elections saw strong use of television ads by political parties and interest groups. Those ads proved especially hard-hitting and negative. Party and interest group advertisements have a particular advantage in judicial races in taking a negative approach since third party ads are not subject to the restrictions of the Canons of Judicial Ethics. While some candidates for judicial office have publicly requested interest groups to stop campaign efforts on their behalf,²⁴ there is little political incentive to do so. As Ansolabehere and Iyengar point out: “Organized interests seem to have a unique edge in going negative. Attack advertisements from interest groups convey all of the negatives about the candidate who is attacked without the risk of a political backlash against the candidate the group supports.”²⁵

One should not overlook that such advertising campaigns provide a mechanism to attack the opponent while the supported judicial candidate remains above the fray and well within the requirements of the Canons of Judicial Ethics.²⁶ If nothing else, however, television vastly increases the audience to

1197, 1224 n.167 (2000).

22. Commonly, a candidate will allege that the other side is corrupted by campaign money and is the captive of special interests. Such a theme was found in all four states. Some Ohio commercials pushed this theme so hard that the Ohio State Bar Association President spoke out against the commercials. See videotaped comments of Reginald Jackson, President of the Ohio State Bar Association (on file with *Indiana Law Review*).

23. STEPHEN ANSOLABEHRE ET AL., *THE MEDIA GAME: AMERICAN POLITICS IN THE TELEVISION AGE* 100 (1993).

24. Schotland, *supra* note 5.

25. STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* 128 (1996).

26. “In an era of thirty-second television advertisements, interest group advertising can hold considerable sway over the electorate, and the independent expenditures of interest groups can be especially hard-hitting since they are free of ethical constraints.” Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1408-09 (2001).

which misleading, questionable, or improper statements may be directed. Because there has been so little research on the use of television in judicial campaigns, as opposed to research on campaigns for other offices, it is important to obtain a more general idea of the nature of judicial television ads.²⁷ Are the types of ads mentioned above characteristic of judicial campaigns? Or, are judicial television ads generally informative to voters? With a better understanding of the nature of judicial television ads, we could better understand this new era in judicial politics.

III. TELEVISION AND JUDICIAL CAMPAIGNS IN 2000 IN ALABAMA, MISSISSIPPI, MICHIGAN, AND OHIO: SIGNALING AND THE THEMES OF CRIME CONTROL, CIVIL JUSTICE AND FAMILY VALUES

With the generosity of the Brennan Center, I was able to obtain transcripts of forty-four judicial campaign ads that were run in Alabama, Michigan, Mississippi, and Ohio in the 2000 elections. These represent the bulk of judicial campaign ads broadcast in seventy-five major media markets in those states during the 2000 campaigns.²⁸ From a variety of other sources, I was able to identify eleven additional ad transcripts.²⁹

Some of the more notable characteristics of the ads are summarized in Table 2. The extent of third party involvement in the airing of ads is especially impressive. Of the fifty-five ads, only twenty-eight were paid for by the

27. The lack of research on judicial television ads is due to the newness of television as a judicial campaign medium. Until recently, limited funds made the use of television for judicial campaigns prohibitive. See Schotland, *supra* note 6, at 150. Paul Carrington writes that "the media blitz exponentially increases the cost of campaigns . . . [H]igh-priced judicial elections are a public disaster. The cost of such campaigns has been doubling almost every biennium so that judicial campaigns are regularly spending millions, much of it on spot advertising on commercial campaigns are regularly spending millions, much of it on spot advertising on commercial television . . ." Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 112 (1998).

28. Due to statistical coding errors, seven judicial ads that were identified by the ad monitoring system were not provided to the Brennan Center.

29. Three ads not in the Brennan Center compilation were candidate ads from Alabama that can be viewed at <http://www.yourvotealabama.org/adwatch/adsolution>. Two ads, one produced by the Michigan Democratic Party and the other by the Michigan Chamber of Commerce, were noted in Laura Potts, *High Court Race Begins Early with Dueling Ads*, FREE PRESS (Detroit), Aug. 17, 2000, at 1, available at http://www.freep.com/news/mich/court17_20000817.htm. Three ads were provided by Professor Roy Schotland of the Georgetown Law Center. They were all Chamber of Commerce ads from Mississippi. One Michigan Republican Party ad was located at <http://www.migop.org>.

Mr. William Quinlan also provided a Michigan Democratic Party ad. A final Michigan Democratic Party ad was mentioned on Associated Press wires on November 1, 2000 at 6:29 p.m. It is unknown how many times these eleven ads were broadcast.

candidates.³⁰ Ten of the ads were aired by the political parties, fourteen were aired by defense interests such as the Chamber of Commerce and other business groups, and three were aired by plaintiffs' lawyers and unions.³¹ The considerable number of ads paid for by third parties is a strong indication of the increased involvement of interest groups in judicial elections. From the perspective of the interest groups, an effort to persuade voters independent of any official statements by the candidate may be desirable since it removes the ad from the ethical restrictions and political accountability that may be placed on a candidate.³²

In discussing political ads, Ansolabehere, Behr, and Iyengar note that "[T]he battle over paid media is fought in 30-second increments."³³ This is certainly the case with televised judicial ads. All but five of the fifty-five commercials surveyed for the article were thirty seconds long and those five were each fifteen seconds in length. With few exceptions, these ads were repeated time and again. That is because for an ad to have impact on an election, it must be shown numerous times, often in prime time.³⁴ Judicial ads are no exception to this standard. The forty-four ads obtained from the Brennan Center were broadcast at least 13,203 times.³⁵ Those that were candidate ads were broadcast 7151 times and the third party ads were broadcast 6052 times. Thus, of the judicial ads for which data are available, forty-six percent of the judicial ads broadcast were not under the control of the candidate or the Canons of Judicial Ethics.

Not all ads received the same degree of repetition. One Mississippi candidate ad was broadcast only three times, while one Ohio Democratic Party ad was broadcast 1695 times and an Ohio Chamber of Commerce ad was broadcast 1159 times. Overall, only six ads were broadcast fewer than fifty times each. Thirteen ads were broadcast between fifty-one and 150 times each; nineteen ads were broadcast between 201 and 450 times each; two between 451 and 600 times each; and only four were broadcast over 900 times.³⁶ One should, however, be cautious in interpreting the importance of mere repetition of ads. In addition to the frequency of ads, other data regarding the ads must be considered to fully understand their value. In particular, data on the media market in which the ad was broadcast, the time period over which the ad was broadcast, and the time slots in which the ad was shown are important. Ads shown in urban areas such as Houston, for example, would have greater impact on potential votes than the same ad shown in the much smaller Abilene-Sweetwater market. Ads shown over a brief time period probably would not be absorbed by the voters as well as an ad broadcast over many days. Similarly, ads shown in some time slots or

30. See tbl.2.

31. *Id.*

32. Champagne, *supra* note 1, at 1408-09.

33. ANSOLABEHERE ET AL., *supra* note 23, at 100.

34. *Id.* at 89.

35. The seven ads not included in the Brennan Center compilation due to coding errors were broadcast a total of 2514 times. See Appendix, *infra*.

36. See *id.*

during certain programs would be far more likely to reach potential voters than at some other slots or programs.³⁷

There were still television ads that followed the traditional model of judicial campaigning—talking about the qualifications and experience of the candidate, not signaling judicial attitudes and values, avoiding discussion of legal issues or cases, and refusing to attack one's opponent. However, those ads were rare. Only eight of the fifty-five ads reflected such a traditional approach to judicial campaigning.³⁸

One thing that is particularly clear about the messages in many of these ads is that the commercials provide signals to voters about the candidates' judicial philosophies.³⁹ Those signals may sometimes be ambiguous. An example is an Alabama commercial in which the candidate and citizens comment on the supreme court candidate's fairness and impartiality. The candidate claims he has "the experience, the reputation, the judicial temperament and also the judicial

37. Deardourff Interview, *supra* note 13.

38. All of these ads were paid for by the candidates as opposed to interest groups. Two of the ads stressed newspaper endorsements. A speaker in one of the ads was a former U.S. senator (and former state supreme court justice). Another ad emphasized that the candidate had been praised by the governor. Still another ad stressed the candidate's father, a recently deceased former supreme court justice. An example of such a traditional ad was a fifteen-second ad aired in Ohio: "His integrity and philosophy have made him one of the most respected judges in Cuyahoga County. Judge **** has real world experience. ****. Honest, fair Ohio values." *O'Donnell Real World Experience*, Ohio, 2000 Election, Candidate Ad.

The aforementioned ad was run by the challenger against Justice Alice Resnick. Resnick was attacked with far more aggressive ads sponsored by the Chamber of Commerce and its affiliates. The Chamber's efforts in the Ohio Supreme Court race cost millions of dollars. Schotland, *supra* note 5. An example of the aggressive nature of the Chamber's ad campaign against Resnick is *Resnick Took from Injury Lawyers*, Ohio, 2000 Election, U.S. Chamber of Commerce.

39. Signaling is not limited to television ads. Some commenters have expressed the concern that signaling of attitudes and values actually represents a candidate's prejudging a case. See, e.g., David Barnhizer, "On The Make": *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U.L. REV. 361, 388 (2001). Barnhizer mentions reports that

"in one of the Illinois primaries this spring, a Republican Supreme Court justice, S. Louis Rathje, was unseated by a challenger who paid for campaign fliers that were distributed by anti-abortion groups. They described the challenger, Robert R. Thomas, as 'the only endorsed pro-life candidate.'" Judge Rathje warned that the tactic used by Thomas showed that politics were now a full part of judicial elections. Rathje claimed the problem is that: People who have cases in court . . . will have to get used to appearing in front of judges who have already stated their views. "Would you feel more or less comfortable . . . with a judge who has already told you how he is going to rule?" *Id.* (quoting William Glaberson, *State Judges Are Acting More Like Politicians as Challenges Grow*, J. REC. (Oklahoma City), June 23, 2000, available at 2000 WL 14296340) (footnote omitted). Judge Thomas said that the pro-life declaration was simply a statement of his personal views. "It has nothing to do with my even-handed participation in cases." *Id.*

philosophy that suits me well for that job.”⁴⁰ Except for one sentence, the ad is innocuous and does not offer any elaboration of the candidate’s experience, reputation, temperament or philosophy. However, in one sentence the candidate says, “I respect the right to a trial by jury.”⁴¹ On the one hand, the statement may be seen as mere campaign rhetoric. On the other, the candidate is arguably presenting a cue to voters about one of the more important legal issues in Alabama today—the extent to which juries function as decisionmakers.

Other ads are subtle and their meaning less ambiguous, even though they still rely on rather vacuous terms and phrases. For example, one candidate’s ad says, “He does not make policy from the bench [He is] honest, [has] common-sense, conservative.”⁴² The language is general, but it does project the image of a non-activist, conservative judicial philosophy.

While the above-mentioned ad signals certain attitudes and values to voters, many of the ads are much more glaring in discussing judicial values. One candidate ad stressed the candidate’s views on crime control in which the candidate stated, “I think for too long our courts have really emphasized the rights of criminals at the expense of victims.”⁴³ This was followed by an announcer saying, “Supreme Court Justice **** believes in protecting the rights of police officers, victims, and law-abiding citizens. Technicalities or loopholes shouldn’t keep criminals on the street. That is why Justice **** is supported by more than 22,000 Michigan police officers.”⁴⁴ The candidate then commented, “I think police officers are really champions of our society.”⁴⁵ Such a crime control appeal is, to say the least, not unusual. An Alabama Supreme Court candidate ran an ad saying,

Why did the Alabama Fraternal Order of Police endorse Judge **** over **** for Alabama Supreme Court? Because she respects law enforcement. Judge ****. A twenty-year record fighting crime as a prosecutor and judge. A ninety-one percent conviction rate in DUI cases as a district judge. And last year in two tragic cases, Judge **** sentenced two convicted murderers to the death penalty⁴⁶

40. *Woodall Nothing but Fair*, Alabama, 2000 Election, Candidate Ad.

41. *Id.*

42. *O'Donnell Without Fear or Favor*, Ohio, 2000 Election, Candidate Ad.

43. *Taylor Victims' Rights*, Michigan, 2000 Election, Candidate Ad.

44. *Id.* Endorsements by police, state trooper or sheriffs’ organizations are frequently mentioned in ads. In five ads, endorsements by various police organizations were mentioned and in two ads endorsements by both police organizations and prosecutors were mentioned. Finally, in one ad, endorsements by police and teacher organizations were mentioned. No other organizational endorsements were mentioned in any ads except for endorsements by various newspapers. Newspaper endorsements were mentioned in four ads. Newspaper endorsements in ads are considered especially useful since they provide a third party validation of the merits of the candidate. Deardourff Interview, *supra* note 13.

45. *See supra* note 44.

46. *Stuart F.O.P. Endorse*, Alabama, 2000 Election, Candidate Ad.

The ad touched all the buttons. Police liked this candidate. She was a prosecutor and a crime fighter. She was tough on drunk drivers. She was tough enough on crime that she would sentence murderers to death. After seeing the ad, few voters would doubt her views on law and order.

Of the fifty-five television ads surveyed for this Article, twenty-three presented some sort of a crime control message.⁴⁷ However, fifty-two percent (twelve of the twenty-three) of ads with a crime control message were candidate-sponsored ads. One is reminded of Oregon Justice Hans Linde's comment about judicial campaign slogans: "Every judge's campaign slogan, in advertisements and on billboards, is some variation of 'tough on crime.' The liberal candidate is the one who advertises: 'Tough but fair.' Television campaigns have featured judges in their robes slamming shut a prison cell door."⁴⁸

While a crime control message was extremely important in the campaign ads, another major theme of advertising dealt with civil justice issues. Of the fifty-five television ads, twenty-one of the ads offered some sort of treatment of civil justice issues, ranging from a criticism of a justice's dependence on funding from trial lawyers to a discussion of judicial candidates' views on product liability issues. However, while fifty-two percent of the crime control ads were candidate-sponsored, only twenty-four percent (five of twenty-one) of the civil justice ads were. The most frequent and clear-cut treatment of civil justice issues were run in ads by third parties. For example, one ad asked:

Is justice for sale in Ohio? You decide. Since 1994, Justice **** has taken over \$750,000 from personal injury lawyers. Justice **** ruled in favor of trial lawyers who had contributed to her campaign seventy percent of the time. After a union leader and a big contributor complained about a ruling **** made, **** became the only Justice to reverse herself in the case. ****. Is justice for sale?⁴⁹

A Michigan ad dealing with civil justice mentioned that the opposing candidate had "represented the radical Welfare Rights Organization and she's a personal injury lawyer."⁵⁰

One of the most blatant discussions of product liability issues was a Michigan ad:

Should corporations that know they're selling dangerous defective products be held accountable? Michigan Supreme Court Justices **** and **** don't think so. They support a law that makes it harder

47. This includes mention of endorsements by law enforcement and an ad denying that a judge had departed from sentencing guidelines. Mention of being a "tough judge" without a crime-related context or mention of background as a military policeman was not considered by me as being a crime control message.

48. Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1995).

49. *Resnick Is Justice for Sale*, Ohio, 2000 Election, Citizens for a Strong Ohio.

50. *Robinson and Fitzgerald Reverse*, Michigan, 2000 Election, Chamber of Commerce Ad.

to hold corporations accountable for dangerous products. ***** and ****. A law that could hurt families whose loved ones were killed or injured in accidents with Firestone tires. **** **** and ****. Oh no. Republicans who put big corporations and insurance companies ahead of people.⁵¹

Candidate ads also sometimes provided a strong message on civil justice issues. For example, one candidate ad in Michigan stated:

For over twenty years, I have been fighting for Michigan families in our legal system. I've learned that all people ask for is fairness. But today our supreme court is packed with politicians who side time and again with big insurance companies. My opponent has even been willing to ignore the law just to be sure that special interests win. That's wrong. I am ****. I want to change the Supreme Court and give our families a fair shake, because where does it say that only the rich and powerful deserve justice?⁵²

Notable within the category of ads with a civil justice theme was a recurring charge that the opposing candidate was "for sale" or "sold to business and insurance interests" or to trial lawyers. For example, a third party-funded ad in Alabama that attacked funding by trial lawyers stated:

[Announcer]: If you thought we finally got greedy trial lawyers out of Alabama politics, try again. Alabama trial lawyers are funneling millions of dollars to ****, ****, **** and ****'s campaigns for Supreme Court. And trial lawyers are spending even more to fund new attack ads. We know why trial lawyers are spending that kind of money but why are ****, ****, ****, and **** taking it? Tell Democrats ****, ****, ****, and ****: Get trial lawyer money out of our court.⁵³

One Ohio justice ran a fifteen-second reply and rebuttal ad to Chamber of Commerce ads saying, "I've enforced our laws for your protection. Now a powerful special interest wants to buy your court. We must stop them because we all deserve justice."⁵⁴

The most frequent theme besides crime control and civil justice was family values. Nineteen of the fifty-five ads touched on family values (including religion). An ad for an Alabama candidate for the supreme court had endorsements from people who felt the judge had benefited their children. The judge, who advertised that she was a "Founding Member of Children First Foundation," ran a closing to an ad in which a man said, "You are recognized as

51. *Markman Taylor Young Defective*, Michigan, 2000 Election, Michigan Democratic State Central Committee.

52. *Robinson Fighting for MI Families*, Michigan, 2000 Election, Candidate Ad.

53. *Greedy Trial Lawyers*, Alabama, 2000 Election, Citizens for a Sound Economy.

54. *Resnick Enforced Our Laws*, Ohio, 2000 Election, Candidate Ad.

a young leader who helps create a better future for our children.”⁵⁵ The Michigan Democratic Party praised one candidate in an ad because he “strongly supports working families.”⁵⁶ An Ohio candidate ad stressed that the candidate was a “judge, husband, father, youth soccer coach . . . [and] a state-wide leader in stopping domestic violence.”⁵⁷ Some ads brought religion into the family values theme.⁵⁸ One Mississippi candidate was involved with a child protection program and was also a Baptist deacon.⁵⁹ An Alabama ad mentioned that not only was the candidate a deacon, but he had also been married for thirty years.⁶⁰

The family values theme was sometimes used in conjunction with the crime control theme. Three candidates were said to “protect Michigan families.”⁶¹ Another Michigan ad mentioned that three supreme court candidates are “weak on gun crime” and “wrong for our kids.”⁶² A Mississippi candidate had worked at the Bureau of Narcotics where “she helped punish the drug pushers who victimize our children.”⁶³ The vote for three justices mentioned in a Michigan ad would provide “safer communities for our kids and families.” According to that ad, safer communities is what “justice means.”⁶⁴

Often in the Michigan ads, the family values theme was used in conjunction with the civil justice theme to illustrate how civil justice issues have relevance to the average voter. In a Michigan ad, a candidate combined the civil justice issue with the family values issue saying: “I want to change the supreme court and give our families a fair shake, because where does it say that only the rich and powerful deserve justice?”⁶⁵ A Michigan Democratic Party ad used talking trees to accuse three justices of “taking hundreds of thousands in political contributions from the insurance industry and big business” and ruling against families.⁶⁶ That ad was followed by a Michigan Chamber of Commerce ad in which one of the trees, “Don Oak,” lamented his participation in the earlier ad and claimed the justices were not anti-family.⁶⁷ Still another Michigan Democratic Party ad had three justices dancing in a businessman’s pocket and it

55. *Stuart Dear Judge Stuart*, Alabama, 2000 Election, Candidate Ad.

56. *Fitzgerald Frank Kelly Endorsement*, Michigan, 2000 Election, MI Democratic State Committee.

57. *Black Judge Husband Leader 2*, Ohio, 2000 Election, Candidate Ad.

58. Two candidates in Alabama placed considerable stress on a religious issue. One was a judge who advertised that he had fought to display the Ten Commandments in his courtroom against the efforts of liberals and the ACLU. Another candidate’s ad explained that he had represented the judge against the ACLU in the Ten Commandments litigation.

59. *Judge Keith Starrett*, Mississippi, 2000 Election, Chamber of Commerce Ad.

60. See www.yourvotealabama.org/adwatch.

61. *Fitzgerald Frank Kelley*, Michigan, 2000 Election, MI Democratic State Committee.

62. *Fitzgerald Weak on Crime*, Michigan, 2000 Election, MI Republican State Committee.

63. *Cobb Stands up for Us 15*, Mississippi, 2000 Election, Chamber of Commerce.

64. *Taylor Markm as Young Justice*, Michigan, 2000 Election, Candidate Ad.

65. *Robinson Fighting for MI Families*, *supra* note 52.

66. Potts, *supra* note 29.

67. *Id.*

was explained that families never got a fair shake.⁶⁸ Finally, a Michigan Democratic Party ad portrayed two men packing defective baby carriers that were being shipped to Michigan because, “their supreme court makes it almost impossible for anyone to sue if one of their kids gets hurt by one of these [baby carriers]—even if we know they’re dangerous.”⁶⁹

IV. ATTACK AND RESPONSE ADS

A common theme of the television ads was to attack the opponent. Kathleen Hall Jamieson and Karlyn Kohrs Campbell have stressed that a great danger of attack ads, especially if run by a candidate, is that they may discredit the attacking candidate. As a result, they have argued that attack ads were more likely to be sponsored by third parties.⁷⁰ There were a total of seventeen attack ads of the fifty-five surveyed, fifteen of which were run by third parties.

Several of the attack ads went further and explained why the other candidate should be supported. Jamieson has noted that this combination of advocacy and attack is quite effective since it encourages the voter to make distinctions between candidates—both point out the downside of one candidate and why the other candidate should be supported.⁷¹ Of the seventeen attack ads, five combined attack of one candidate with advocacy for another. Often, the attack ads criticized the opposing candidate by name, although one Alabama ad mentioned no names, but criticized the Republicans on the Alabama Supreme Court.⁷²

Attack ads lead directly to response and rebuttal, but response and rebuttal ads were not as frequent as attack ads, and they, like the attack ads, tended to be funded by third parties rather than by the candidate.⁷³ Eight of the ads involved reply and rebuttal, only one of which was funded by a candidate. The Michigan Republican Party ran an ad criticizing an appellate decision by a candidate for the supreme court that involved the sentence of a child molester.⁷⁴ In response, the Michigan Democratic State Committee ran an ad in which the former Michigan attorney general stated: “That ad attacking Judge **** is disgraceful and a complete lie. Judge **** did not impose the sentence mentioned in the ad. I’ve

68. Videotape on file with the *Indiana Law Review*.

69. *Id.*

70. KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA* 267 (5th ed. 2000).

71. Kathleen Hall Jamieson, *Doing Well by Doing Good?*, in “STAND BY YOUR AD”: A CONFERENCE ON ISSUE ADVOCACY ADVERTISING 6 (1997).

72. *Firestone and Ford*, Alabama, 2000 Election, Alabama Democratic Party.

73. Jamieson points out that the response and rebuttal to an attack is as old as the Republic, noting that “[A] falsehood that remains uncontradicted for a month, begins to be looked upon as a truth . . . and when the detection at last makes its appearance, it is often as useless as that of the doctor who finds his patient expired.” KATHLEEN HALL JAMIESON, *DIRTY POLITICS* 102 (1993) (citing William Corbett, *Porcupine’s Gazette* (1797)).

74. See www.migop.org.

known **** to be an honest and fearless judge.”⁷⁵ Then the former attorney general⁷⁶ went on to endorse all three Democratic supreme court candidates and added a more general statement about attacks on the candidates: “Don’t believe it when special interest groups use sleaze on these fine people. ****. ****. ****. Supreme court candidates who’ll protect Michigan families.”⁷⁷

The Chamber of Commerce ads that were run in several states provoked strong reply ads from other third parties and a candidate. An example of a response ad that went on the attack was a candidate-sponsored ad in Mississippi that attacked the Chamber of Commerce, the candidate’s opponent, and the alleged attitude of his opponent on civil justice issues.

[Auctioneer]: I’ve got 300, now 320 . . . [Announcer]: A Washington D.C. special interest group has already pumped a half million dollars into TV ads backing its candidates for the Mississippi Supreme Court. They know their candidates, like ****, are more likely to listen when the HMOs and big drug companies need a favor. The secretary of state has asked the attorney general to investigate these questionable expenditures. Do they think justice is up for sale here? [Auctioneer]: Sold. [Announcer]: Send these out-of-state meddlers a clear message that the Mississippi Supreme Court is not for sale. [Announcer 2]: On November 7, vote for the candidate who’s not for sale . . .⁷⁸

The Ohio Democratic Party ran an ad that began as a response ad and later turned to an attack ad:

[Announcer 1]: Why are corporate polluters and a big insurance company spending hundreds of thousands distorting ****’s record?

75. *Fitzgerald Frank Kelley, supra* note 61.

76. The main speakers in most of all the ads were either announcers or candidates. One explanation for the relatively few ads that presented endorsements by public officials is that there are very few officials today with popularity so great that their endorsement would clearly benefit the judicial candidate. *See Deardourff Interview, supra* note 13. However, a former U.S. senator (and former supreme court justice) appeared in one ad, a former state attorney general appeared in two ads, an attorney appeared in three ads, a fellow justice on the court appeared in one ad, and a sheriff appeared in one ad. In one ad, the chief justice’s praise was quoted and the candidate mentioned the names of the two governors who appointed him to offices. One ad mentioned an endorsement by the governor, although the governor was not a speaker in the ad. Another ad was built around the candidate’s father, then deceased, who had previously served on the state’s supreme court. Undoubtedly, there could be significant problems with collegiality on a court where fellow justices endorse the losing candidate.

Chief Justice Springer of the Nevada Supreme Court has written that endorsements by officials such as a state attorney general is a “political alliance” that creates problems of partiality in cases where that official is involved. *See Nevius v. Warden*, 960 P.2d 805, 809 (Nev. 1998) (Springer, C.J., dissenting).

77. *Fitzgerald Frank Kelley, supra* note 61.

78. *Easley Not for Sale*, Mississippi, 2000 Election, Candidate Ad.

[Announcer 2]: Maybe because she's taken on the special interests.
 [Announcer 1]: Stood up for families by exposing Ohio's dilapidated schools. [Announcer 2]: Fought for quality education for all Ohio's children. [Announcer 1]: But in the same landmark court decision, **** said no to education reform and no to our kids. [Announcer 2]: Say no to special interests and no to ****. . . .⁷⁹

The Ohio ad's treatment of decisions was not a rare event. In four ads there was positive mention of decisions and in six ads there was negative mention. A Chamber of Commerce ad run in Ohio displayed an especially strong negative treatment of a decision. The ad stated:

[Announcer]: It was a simple law. A common-sense measure to insure college professors at public universities in Ohio spend more time in the classroom teaching. But Justice **** wrote a majority opinion saying this education accountability law violated the Constitution. ****'s decision stopped the legislature's effort to have instructors spend more time in the classroom. The United States Supreme Court stood up for common sense and overturned ****'s holding in an 8-1 decision so today in Ohio instructors teach and students learn in spite of ****.⁸⁰

Another ad that voiced especially strong criticism of court decisions was run by the Alabama Democratic Party:

[Announcer]: Firestone tires and Ford Explorers. A national tragedy. But it's worse for victims in Alabama. We don't even have the right to confront Ford or Firestone in court. Alabama Firestone victims lost their right to trial by jury. All because our Republican supreme court has ruled that binding arbitration is the only option. Firestone and Ford like it but you shouldn't. On Tuesday, vote against Alabama's Republican supreme court.⁸¹

The effort to use a highly publicized legal issue, such as the safety of Firestone tires, was also used in a Michigan Democratic Party ad:

[Woman]: Should corporations that know they're selling dangerous, defective products be held accountable?

[Man]: Michigan Supreme Court Justices ****, ****, and **** don't think so.

[Woman]: They support a law that makes it harder for people to hold corporations accountable for dangerous products.

[Man]: ****, ****, and ****.

[Woman]: A law that could hurt families whose loved ones were killed or injured in accidents with Firestone tires.

79. It should be noted that the ad discussed Ohio Supreme Court decisions. *Resnick Corporate Polluter*, Ohio, 2000 Election, Ohio Democratic Party Ad.

80. *Resnick College Law*, Ohio, 2000 Election, Chamber of Commerce Ad.

81. *Firestone and Ford*, *supra* note 72.

[Man]: ****, ****, and ****, oh no.

[Woman]: Republicans who put big corporations and insurance companies ahead of people.⁸²

CONCLUSION

One important aspect of the “nastier, noisier, and costlier”⁸³ modern judicial campaign is the widespread use of television in judicial elections. The existing data on judicial campaigns strongly suggest that television is very effective in generating votes for judicial candidates. With television ads, there was widespread signaling by Internet groups, political parties, and often by the candidates themselves of the attitudes and values of judicial candidates. While such campaign tactics have undoubtedly been used prior to the advent of television, they seem more visible and common with the greater involvement of third party interest groups in modern judicial campaigns.

In the sample of television ads examined for this Paper, judicial candidates battled to outdo one another in their tough-on-crime attitudes and their support for and by law enforcement. As Hans Linde explained, such an approach has remarkable political appeal, but one has to wonder about whether judges should so closely align themselves with crime control institutions and attitudes.⁸⁴ Indeed, the Chief Justice of Nevada wrote in a dissenting opinion, “Judges should be judging crime not ‘fighting’ crime.”⁸⁵ While crime control was clearly the most common theme of judicial television ads, civil justice issues and family values were also important themes. The civil justice theme commonly focused on charges of opposing candidates being captives of special interests and accusations that campaign contributions have had a corrupting effect on the opponent. The third theme was one of family values, which emphasized that the candidate was pro-family and holds solid traditional values. In Michigan, the family values theme meant, depending on the sponsor of the ad, that the three Democratic candidates were either “candidates who’ll protect Michigan families” or candidates who were “wrong for our kids.”⁸⁶

The most important aspect of judicial television ads in the 2000 elections was the involvement of third parties. About forty-six percent of the number of broadcasts for which the data were available were broadcasts of third party ads. The involvement of third parties has particularly intensified the battles over civil justice issues and the viciousness of judicial campaigns has clearly increased as a result of their involvement. The third party ads are, unlike candidate ads, not subject to the Canons of Judicial Ethics—and it shows. Of course, while it is clear not all candidates appreciate the support of third parties,⁸⁷ it is also the case

82. Markman Taylor Young *Defective*, *supra* note 51.

83. Schotland, *supra* note 6, at 150.

84. Linde, *supra* note 48, at 2000.

85. *Nevius v. Warden*, 960 P.2d 805, 810 (Nev. 1998) (Springer, C.J., dissenting).

86. *Fitzgerald Frank Kelley*, *supra* note 61; *Fitzgerald Weak on Crime*, *supra* note 62.

87. The Chief Justice of Mississippi, for example, disavowed the third party ads on her behalf

that candidates may benefit from the hard-hitting third party ads and yet avoid political accountability for them.

The use of television to focus on unpopular decisions (or decisions that can be interpreted that way) may cause judges to be more cautious about the electoral consequences of individual decisions. As noted earlier, one Michigan GOP ad focused on a decision by an intermediate appellate judge that upheld a light sentence for a pedophile.⁸⁸ In addition to the focus on one case, the word “pedophile” in large type flashed close to the judge’s name.⁸⁹

With the increasing importance of money and interest groups to the funding and airing of television ads, judicial candidates may well have to appeal more to the support of vastly opposing interests. Alabama Supreme Court races, for example, have been described as “a battleground between business and those who sue them.”⁹⁰ The result is likely to be more extremist appeals by judicial candidates and less moderation in judicial decisions. Unfortunately, the genie is out of the bottle and cannot be put back in.⁹¹ Solutions harkening back to the old, low cost-low media era in judicial campaigns are unrealistic, and the judicial politics of this era will clearly continue to involve television ads such as those discussed in this Paper.

With the widespread involvement of Internet groups and parties in judicial campaigns, along with big money and the use of television, come important issues involving the appropriate limitations on judicial campaign speech. To what extent does the First Amendment allow for restrictions, if any, on this new era in judicial campaigns? The companion Articles in this Symposium will address these questions.

and may have been defeated by a backlash against third party involvement. Schotland, *supra* note 5.

88. See *supra* note 21 and accompanying text.

89. The Michigan GOP response to questions about the “pedophile” label was, “We don’t call him [a pedophile].” See Schotland, *supra* note 5.

90. See Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656 (1999).

91. In Pennsylvania’s 2001 supreme court elections, business advocacy groups organized in favor of one candidate, while unions and trial lawyers backed the other candidate. See Brennan Center, *Court Pester E-lert*, Aug. 14, 2001 (summarizing Josh Goldstein & Chris Mondics, *Pro-Business Group Tries to Sway Pennsylvania Supreme Court Appointment*, PHILA. INQUIRER, Aug. 12, 2001, available at 2001 WL 26624197).

Table 1
Television and Texas Supreme Court Election Outcomes

| Year | Candidate (Established candidate listed first) | Statewide Vote for Established Candidate | Vote in Media Markets with Television Buys by Established Candidate Only | Vote in Media Markets with No Television Buys |
|------|---|---|---|--|
| 2000 | Gonzales Gorman | 58% (523,983) | 59% (497,611) 41% (345,536) | 43.9% (26,372) 56.1% (33,680) |
| 1998 | Hankinson Smith | 59.42% (290,964) | 64.62% (231,045) 35.38% (126,502) | 48.67% (26,385) 51.33% (27,829) |
| 1994 | Hecht Howell | 60.98% (277,522) | | 47.65% (46,477) 52.35% (51,061) |
| 1992 | Enoch Howell | 59.94% (371,549) | | 42.59% (16,957) 57.41% (22,855) |

Source: The data were compiled by Texas' Chief Justice Thomas R. Phillips and by Karl Rove and were presented at the Summit on Improving Judicial Selection, December 8-9, 2000. Further detailed data can be found in 34 LOY. L.A. L. REV. 1508-12 (2001).

Table 2
Characteristics of Judicial Campaign Television Ads
(Total ads: 55)

| | |
|--|---|
| Purchaser of Ads | Candidate: 28 Political Parties: 10 Defense (Business) Interests: 14 Plaintiffs' Attorneys and Unions: 3 |
| Themes of Ads (Some ads have more than one theme) | Traditional Judicial Campaigning: 8 Crime Control: 23 Family Values: 19 |
| Type of Ads | Attack Ads: 17 Reply and Rebuttal Ads: 8 |
| Ads that were Candidate-Sponsored | Traditional Ads: 8 of 8 Crime Control: 12 of 23 Civil Justice: 5 of 21 Family Values: 7 of 19 Attack Ads: 2 of 17 Reply and Rebuttal: 1 of 8 |

APPENDIX

DATA ON JUDICIAL TELEVISION ADS

| State | paid by: | crime cont. | civil justice | traditional | family val. | times shown |
|-------|-----------------|-------------|---------------|-------------|-------------|-------------|
| AL | AL Dem. Party | | yes | | | 139 |
| AL | Candidate | | | yes | | 128 |
| AL | Candidate | | yes | | | 224 |
| AL | Candidate | yes | | | | 304 |
| AL | Candidate | | | yes | | 322 |
| AL | Candidate | | | | | 326 |
| AL | Candidate | | | yes | | 347 |
| AL | Candidate | | | yes | | 376 |
| AL | Candidate | | | yes | yes | 419 |
| AL | Candidate | | | | yes | Unknown |
| AL | Candidate | | | | yes | Unknown |
| AL | Candidate | | | | yes | Unknown |
| AL | Cit. Sound Eco. | | yes | | | 78 |
| MI | Candidate | yes | | | | 90 |
| MI | Candidate | yes | | | | 110 |
| MI | Candidate | | yes | | yes | 267 |
| MI | Candidate | yes | | | | 354 |
| MI | Candidate | yes | | | | 364 |
| MI | Candidate | yes | yes | | | 427 |
| MI | Candidate | yes | | | yes | 443 |
| MI | Chamber | yes | yes | | | 82 |
| MI | Chamber | | yes | | yes | Unknown |
| MI | MI Dem. Party | yes | | | yes | 11 |
| MI | MI Dem. Party | yes | | | yes | 347 |
| MI | MI Dem. Party | | yes | | yes | 457 |
| MI | MI Dem. Party | | yes | | yes | Unknown |
| MI | MI Dem. Party | | yes | | yes | Unknown |
| MI | MI Dem. Party | | yes | | yes | Unknown |
| MI | MI Dem. Party | yes | | | yes | 206 |
| MI | MI Dem. Party | yes | | | yes | Unknown |
| MS | Candidate | yes | | | | 3 |
| MS | Candidate | yes | yes | | | 6 |
| MS | Candidate | yes | | | | 54 |
| MS | Chamber | yes | | | yes | 22 |
| MS | Chamber | yes | | | yes | 66 |
| MS | Chamber | yes | | | | Unknown |
| MS | Chamber | yes | | | | Unknown |
| MS | Chamber | yes | | | | Unknown |
| OH | Candidate | yes | | | yes | 100 |
| OH | Candidate | yes | | | | 106 |
| OH | Candidate | | | yes | | 120 |
| OH | Candidate | | | yes | | 278 |

[illegible]

THE EFFECTS OF MEDIA-BASED CAMPAIGNS ON CANDIDATE AND VOTER BEHAVIOR: IMPLICATIONS FOR JUDICIAL ELECTIONS

SHANTO IYENGAR*

INTRODUCTION

In “Television Ads in Judicial Campaigns,”¹ Professor Anthony Champagne has made an important contribution to political science. His Paper comprehensively documents the emergence of television advertising as a key ingredient in judicial elections.² While traditionally, candidates for judicial positions largely avoided the glare of media attention,³ more recently would-be judges have begun to conduct campaigns that are strikingly similar to those of candidates for legislative or executive office.⁴ Thus, radio and television ads have become the order of the day.⁵ Interested observers may well ask what factors underlie the new reliance on this form of campaigning, and, equally important, what consequences will ensue for voters and for the judiciary?

This Comment will address both questions from the perspective of a social scientist who has studied the strategies and effects of political advertising in a variety of electoral contexts. My research has focused exclusively on elections for legislative and executive offices. The thoughts offered here are essentially extrapolations drawn from a series of empirically based studies of conventional types of advertising campaigns.

I. WHY ADVERTISING NOW?

There are several possible explanations for the increasing importance of television advertising in judicial elections. The first and most basic is that judges, like candidates for any other elective office, have to make their case to voters. Thus, a candidate has to acquire both name recognition and political acceptability. “Free” coverage in the form of news reports is generally

* The author holds the Chandler Chair in Communications at Stanford University. Professor Iyengar has written extensively on political campaigns, the effects of media presentations on voter behavior, and the psychology of public opinion. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669 (2002).

2. *Id.*

3. *See id.*

4. *See id.*

5. *See id.* at 670.

unavailable to judicial candidates.⁶ Although the press occasionally feels obliged to report on civic affairs, the only beneficiaries of “free” news coverage tend to be candidates contesting “high profile” elections.⁷ Virtually from necessity, therefore, judicial candidates must gravitate to the forum of paid advertising. This situation is particularly unfortunate and problematic for challengers, since advertising is perhaps their only available strategy for overcoming the huge incumbency advantage in judicial elections.⁸

A second factor that accounts for increasing advertising efforts by judicial candidates is the expansion of the political consulting industry. As elections have become increasingly “professionalized” across the board, the focus of campaign managers has been on the adroit use and manipulation of the media—through “free” coverage, where possible, and through paid advertising in abundance. In fact, a common ploy used by consultants is to use their advertisements as the “bait” with which to attract the attention of reporters. A particularly hard-hitting attack on the opponent is generally worth a news report or two, thus gaining the candidate additional “free” exposure. Due to the strong position of incumbents, challengers in judicial elections have special reasons to seek this type of consultation. Incumbents must then respond in turn with equal media coverage. Thus, it is reasonable to assume that judicial elections are only going to become more “sophisticated” in terms of this spiral of advertising and fund raising.

II. VOTER BEHAVIOR IN LOW INFORMATION ELECTIONS

How might the use of campaign advertising affect the outcome of judicial elections? Before I address the possible effects of advertising on voter behavior, it is important to acknowledge that judicial elections are typical of what political scientists call “low-information” elections, elections for offices about which the public is relatively uninformed.

What is especially interesting about these elections is that for the most part voters *do* make choices.⁹ Many more, however, “make do” with what little information they have. Therefore, for persons interested in judicial elections, it is paramount to understand how and why voters choose between candidates when they know very little about the “substantive” credentials that would seem most relevant to the candidates themselves.

6. For evidence on the shortage of news coverage accorded state and local candidates, see M. Kaplan & N. Hale, TV News Coverage of the 1998 California Gubernatorial Election (unpublished paper, USC).

7. STEPHEN ANSOLABEHERE, ROY BEHR & SHANTO IYENGAR, *THE MEDIA GAME: AMERICAN POLITICS IN THE TV AGE* (1991).

8. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 317-18 (2001).

9. See *id.* at 324. To some degree it is true that voters simply “opt out” by failing to cast a vote on low-information races and propositions; this phenomenon is known in our trade as “ballot roll-off.”

The evidence is overwhelming that in the case of partisan elections, the answer for most voters is simple: voters rely on their party affiliations on the assumption that the candidate of their party is more responsive to their preferences.¹⁰ Contrary to conventional wisdom, party voting is alive and well in the United States.¹¹

Non-partisan elections provide a greater challenge. When voters are denied information about the party affiliation of judicial candidates, the lack of information *could* be an overwhelming problem. Yet, this is not so in practice. Social psychologists have demonstrated that human judgment is remarkably resilient and resourceful.¹² In exercising judgment, humans tend to reach the best possible outcome *given the available resources*, under a theory social psychologists refer to as “satisfice.”¹³ Thus, when denied partisan cues, as in the case of California referenda elections or non-partisan judicial contests, voters likely fall back on relevant, low-cost substitutes, such as endorsements by well-known public figures or voters’ beliefs about the groups supporting and opposing the measure or candidate.¹⁴

An example of this phenomenon occurred in California where the insurance industry sponsored a series of initiatives to “reform” automobile insurance.¹⁵ While it is doubtful that the voters had examined the texts of the proposed statutory changes, nevertheless, they managed to reject them decisively.¹⁶ Research demonstrated that the car-driving public perceived the industry’s interests as contrary to theirs.¹⁷ All they had to know was who sponsored the proposal in order to sway their vote.¹⁸

In the case of non-partisan judicial elections, voters may overcome their lack of information about the candidates’ experience or professional/and legal credentials by relying on name recognition or by relying on the word of credible public figures who have endorsed particular candidates. In many cases, name recognition may provide incumbent candidates with an edge; in other cases, a challenger with the same name as a well-known athlete or entertainer may spell defeat for a distinguished incumbent. Alternatively, voters may resort to the logic of “performance-based” voting.¹⁹ Reasoning that judges are supposed to reduce the incidence of crime, voters may tend to hold incumbent judges

10. See Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AM. J. POL. SCI. 35, 36 (2000).

11. See *id.*

12. DAVID SCHNEIDER ET AL., *PERSON PERCEPTION* (1979).

13. “Satisficing” is often contrasted with “optimizing,” which assumes decisionmaking in a context of complete information.

14. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 64 (1994).

15. *Id.*

16. *Id.*

17. See *id.* at 69-72.

18. *Id.*

19. MORRIS FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981).

responsible for the level of crime.²⁰ In fact, research indicates that the margin of victory for incumbents is significantly eroded during times of rising crime.²¹ Conversely studies show that a decrease in crime rate leads to voter support for the incumbent.²²

I cite the examples of sponsor credibility, party affiliation, name recognition and perceived performance as voting cues only to make the point that voters choose on a cost effective basis, making do with information that is easily available. All drivers know that insurance companies prefer higher premiums; one only needs to scan the ballot to identify the candidates' party affiliation, and the mere act of turning on the television or radio is sufficient to provide information about crime. In the context of these voting cues or shortcuts, we must more closely consider the role of judicial campaign advertising. Because I know of no systematic evidence concerning the effects of television advertising in judicial campaigns per se, I turn to the evidence from national and statewide campaigns for non-judicial offices for clues.

III. WHAT EFFECT DOES ADVERTISING HAVE?

There are two broad classes of effects that political advertising has on voter attitudes.²³ The first has to do with beliefs about and attitudes toward the candidates.²⁴ Advertising enables a candidate to convey information, set the political agenda, and ultimately, it is hoped, increase his or her share of the vote. The second class of effects is more systemic and relates to the electorate's general feelings about campaigns and the electoral process.²⁵ In particular, there is evidence to suggest that negative campaigning increases voter cynicism, thus contributing to lower voter turnout.²⁶

While many do not consider political advertising as a serious form of campaign communication, exposure to advertising nonetheless informs voters and makes them more aware of the candidates.²⁷ Even when the message is delivered in the form of a thirty-second commercial, embellished with musical jingles and eye-catching visuals, viewers manage to acquire new and relevant

20. See Hall, *supra* note 8, at 324.

21. See *id.* at 322.

22. See *id.*

23. Shanto Iyengar & Adam F. Simon, *New Perspectives and Evidence on Political Communication and Campaign Effects*, 51 ANN. PSYCHOL. 149, 154 (2000).

24. See *id.*

25. See *id.*

26. See *id.* at 152; see also Craig Leonard Brians & Martin P. Wattenberg, *Campaign Issue Knowledge and Salience: Comparing Reception from TV Commercials, TV News, and Newspapers*, 40 AM. J. POL. SCI. 172, 174 (1996).

27. See David Weaver & Dan Drew, *Voter Learning in the 1990 Off-Year Election: Did the Media Matter?*, 70 JOURNALISM Q. 356, 365 (1993); see also Brians & Wattenberg, *supra* note 26, at 185.

information about the sponsoring candidate.²⁸ In one well-known example, a candidate for U.S. Senate in California managed to recite his position on six different issues in the span of thirty seconds!²⁹ One possible explanation for this beneficial effect of ads, it must be acknowledged, is that most viewers have very little prior information about judicial candidates. Given this modest baseline, exposure to campaign advertising cannot help but educate voters.

In addition to providing voters with information about the candidates, an important goal of advertisers is to set the campaign agenda. Moreover, most voters are likely to rely on information that is available when it comes time for them to express their preference. Issues or themes that are more frequently encountered during a campaign become more available and salient to voters.³⁰ The reason for repeating the same ad (and Professor Champagne's paper vividly documents the extent of repetitive advertising in judicial elections)³¹ is to make the subject matter of the message more prominent in the public agenda. His evidence shows seventy-six percent of the ads aired in judicial races in 2000 referred to criminal or civil justice issues.³² Given this high percentage, and the fact that advertising was probably the only source of information about the candidates for most voters, most voters likely considered crime rates when casting their vote.

Like candidates for other offices, judicial candidates will also utilize advertising to "set" a political agenda. Typically, candidates base such agendas on the issues for which they enjoy a comparative advantage.³³ Thus, by running ads on the subject of crime, candidates accomplish two objectives: first, they make voters think about crime as a relevant issue. Second, they propel voters' beliefs about the two candidates as crime fighters into key determinants of vote choice. Crime becomes the principal yardstick for evaluating the candidates, thus benefiting the candidate who claims to be "tougher" on crime.³⁴ Alternatively, the candidate who has greater appeal in the area of "family values" or other personal attributes can be expected to attempt to focus the campaign accordingly.

By setting the agenda and altering the foundations of vote choice, campaign advertising can indirectly bolster a candidate's support at the polls.³⁵ However, one must also address the more immediate question of advertising's effects on

28. See Brians & Wattenberg, *supra* note 26, at 185.

29. STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE 59 (1995).

30. Iyengar & Simon, *supra* note 23, at 157.

31. Champagne, *supra* note 1, at 675.

32. He notes that 52.17% of the ads were about crime control and 23.8% about civil justice. See *id.* at 687 tbl.2.

33. See Iyengar & Simon, *supra* note 23, at 156-58.

34. See, e.g., Joanne M. Miller & Jon A. Krosnick, *News Media Impact on the Ingredients of Presidential Evaluations: Politically Knowledgeable Citizens Are Guided by a Trusted Source*, 44 AM. J. POL. SCI. 295, 308-10 (2000) (reviewing the "priming" phenomenon, weighing issues in accordance with their perceived salience).

35. ANSOLABEHERE & IYENGAR, *supra* note 29, at 82.

voters' attitudes towards the sponsoring candidate? Does advertising alone make a candidate more appealing or his opponent less appealing? The answer depends on the type of election.

In partisan elections, the effects of advertising on candidate preference are contingent on viewers' party affiliation.³⁶ Ads aired by Democrats are highly persuasive among Democratic voters, less persuasive among non-partisans, and not at all persuasive among Republicans.³⁷ In the context of partisan judicial elections, accordingly, one would expect that campaign advertising would polarize the electorate by party. In non-partisan elections, where to be recognized is to be liked, advertising should produce a bigger swing in electoral fortunes.

In addition to affecting voter choice, campaigns also affect the predispositions underlying the decision to vote.³⁸ For many years, it was taken for granted that getting out the vote was the *sine qua non* of effective campaigns.³⁹ However, campaign managers are well aware that it is often easier to dissuade people from voting than to convert them from the ranks of the opposition.⁴⁰ Hence, campaign managers routinely use negative advertising with the specific intent of depressing turnout among the opponents' expected supporters.⁴¹ When attacked, candidates must respond in kind. Thus, the initial attack advertisement spawns a negative campaign, fostering cynical attitudes about the candidates and the political process and lowering turnout.⁴² Carefully controlled experimental studies demonstrate that exposure to negative advertising makes voters less likely to believe in the value of elections and more likely to stay home.⁴³

In summary, advertising enables candidates to become better known, to focus attention on particular issues, and, in many cases, to cast aspersions on the opponent's candidacy. The increase of negative advertisements tends to diminish the public's already weak interest in voting.

IV. POLICY IMPLICATIONS

I do not have the space in this Comment to address the many important implications of the modern trend toward media-based judicial elections. However, what I can offer is the prediction that the use of negative campaign tactics in judicial races will spread. Tactics that "work" for consultants in non-judicial campaigns will, inevitably, be put to use in judicial races. Professor

36. *Id.* at 65.

37. *See id.* at 64-66.

38. *See id.* at 104-12.

39. *See id.* at 146.

40. *See id.* at 109.

41. *Id.*

42. *Id.* at 109-10.

43. *See generally id.*; D.A. Houston et al., *Negative Political Advertising and Choice Conflict*, 5 J. EXPERIMENTAL PSYCHOL. APPLIED 3 (1999).

Champagne's evidence demonstrates that third party advertisers, a major force in judicial elections, have especially strong incentives to "go negative."⁴⁴ Since these groups are immune to official oversight or sanction,⁴⁵ the "attack-rebuttal-counter-attack" syndrome will characterize increasing numbers of judicial races.

The spread of negative campaigning in judicial races is likely to have adverse consequences for the court system. The motives of judicial candidates will be cast into doubt, and public esteem for the judiciary will suffer. Not only will candidates for judicial office be equated with ordinary politicians, but the impartiality, independence, and professionalism of the judiciary will also be called into question. Large-scale advertising in state judicial elections will further politicize state courts in the eyes of the public.

V. POSSIBLE REMEDIES

If past experience is a guide, the media is not the answer to the problem. Despite a chorus of calls for "free" airtime for candidates, television and radio stations have been reluctant to oblige. There is simply too much money at stake. Attempts to rely on news organizations as referees or arbitrators of judicial campaigns are, unfortunately, likely to prove counterproductive. In recent years, news organizations have taken to running "adwatch" reports in which particular advertisements are subjected to critical scrutiny.⁴⁶ One wonders about their efficacy in judicial campaigns. Available evidence indicates that when the news media gets into the fray, the swirl of charges and countercharges is only amplified, and voters become still more cynical and withdrawn.⁴⁷ Thus, even if the media were to take up specific issues (e.g., "Did Candidate X really rule in favor of 'drug pushers,' as alleged by Candidate Y?"), it would not solve the problem.

Also, "voluntary restraint" will not be an effective method of toning down campaigns because there is a lack of enforcement problem. Candidates may claim to abide by the prescribed code of conduct, but their surrogates are free to do as they please. In general, candidates are self-interested and rational actors; they pursue winning strategies, not the civic good.

Rather than increased media coverage of judicial elections or promulgation of voluntary canons of campaign conduct, the most promising route to campaign reform may be one which would bypass the media entirely by allowing judicial candidates to communicate directly with the electorate. In a few states including California, the secretary of state publishes a "judicial guide" which is sent (along with the more comprehensive "voting guide") to every household with a registered voter. The official guide provides background information on judicial candidates including their educational accomplishments, legal and judicial experience, and professional affiliations. Given the relatively low level of

44. See Champagne, *supra* note 1, at 673.

45. *Id.*

46. ANSOLABEHERE & IYENGAR, *supra* note 29, at 137.

47. See *id.* at 140 (discussing statistical evidence available on this point).

interest in civic affairs, it is likely that very few voters use these guides.

By enlivening their content and presentation, technology offers the possibility of greater public exposure. A multimedia compact disc, for example, allows voters the opportunity to hear from the candidates "in person" either individually, in the form of prepared statements, or jointly, in the form of debates. The compact disc also provides the user with the freedom to select material that is relevant or interesting. It is both simple and inexpensive to produce a compact disc containing accessible, attention-getting, and relevant information about every judicial election in the state. By presenting the information in a visually appealing and eye-catching manner, electronic voter guides have the potential to broaden the audience for judicial candidates.⁴⁸ In states lacking official guides, nonpartisan organizations (such as the League of Women Voters or the state bar association) could be asked to sponsor a similar effort, thus lending credibility to the information.

My enthusiasm for a "high tech" approach to voter information is based on more than mere speculation. During the 2000 presidential election, Stanford University, with the full cooperation of the Bush and Gore campaigns, produced a multimedia compact disc containing the speeches, televised advertisements and debates, and platforms of the two major candidates. The compact discs were mailed to a representative sample of adult voters two weeks before the election. Nearly one-half of them actually used the compact disc! Subsequent research indicated that voters who used the compact disc were significantly more likely to take an interest in the campaign and vote.⁴⁹ As this one example proves, bypassing the media is beneficial to voters and candidates alike.

CONCLUSION

If past experience in non-judicial elections is a guide, the use of advertising in judicial campaigns will only increase. Negative advertising is an important ingredient of advertising strategy. However, after seeing judicial candidates and their surrogates hurling charges and countercharges at each other, the public will probably think less of the candidates, the selection process, and the judiciary.

How should society respond? Regulating political speech is a non-starter. Depending on the news media and campaign consultants to forego their private interests in favor of the public good is unrealistic. The more appropriate remedy is to liberate both candidates and voters from these interests. Modern information technology allows judicial candidates to deliver vast amounts of

48. The compact disc approach has many advantages over the Internet. Despite their profusion, political websites have attracted relatively small audiences. One of the primary problems has been that political content on the web is far less appealing than non-political content. In addition, the multimedia content offered by candidate websites requires a level of technology (e.g. high speed data transmission capacity) unavailable to most voters.

49. See Shanto Iyengar et al., *Does Direct Campaigning Empower Voters?: Estimating the Impact of a CD Intervention in the 2000 Campaign* (2000) (presented at the annual meeting of the American Political Science Ass'n) (on file with author).

information to a rapidly growing segment of the electorate, free of economic or strategic constraints. For their part, voters are liberated from editorial and other gatekeepers; rather than waiting passively, and most likely in vain, for news reports or advertisements to provide coverage of relevant issues, voters can initiate the queries themselves to obtain information that is personally meaningful. Thus, voter autonomy, the breadth of available information, and candidate control over their message are all realized. In the long run, direct campaigning may contribute to the collective good: increasing the number of people who feel good about the process by which they select judges augurs well for the health of the judiciary.

THE CANONS IN THE COURTS: RECENT FIRST AMENDMENT RULINGS

ROBERT M. O'NEIL*

INTRODUCTION

The new millennium has not been hospitable to the regulation of judicial campaign speech. Efforts to limit what judges and prospective judges may say during election contests are, of course, hardly new. Since 1924, the Canons of Judicial Ethics have restricted the statements of those who seek to attain or retain a judicial office.¹ Yet until quite recently the rules that govern judicial campaigns went largely unchallenged in the courts. All that has now changed, and assaults on judicial election rules have become a major focus of litigation.

First Amendment assaults on the Canons are largely a product of the 1990s, apparently in response to several forces.² First, a major revision of the American Bar Association's Model Code of Judicial Conduct (containing the Canons) occurred in 1990. Widespread revision of state standards soon followed. Moreover, public interest groups have recently shown a heightened concern for the free speech of judges and candidates for the bench.³ Most important, the more contentious character of judicial campaigns seems to have increased the pressure for regulation; such campaigns have recently, in the words of one commentator, become "nastier, noisier, and costlier."⁴ For these reasons, among others, the past few years have brought a dramatic increase in legal challenges to the rules that govern judicial campaigns. The early returns do not bode well for the cause of regulation, as we shall shortly discover. Just before the

* Professor of Law, University of Virginia School of Law; Director, Thomas Jefferson Center for the Protection of Free Expression. A.B., 1956, A.M., 1957, LL.B., 1961, Harvard University. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. See J. David Rowe, Note, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 TEX. L. REV. 597, 599-602 (1995).

2. The earlier landscape, through the mid 1990s, has been admirably charted by Chief Justice Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996). Central among the earlier judgments were contrasting rulings of two federal courts of appeals; compare *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (rule prohibiting judicial candidates from making promises regarding conduct in office and announcing views on disputed legal issues violated First Amendment), with *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991) (rule prohibiting judicial candidates speech on disputed legal issues did not violate candidates' free speech rights).

3. Notably the Center for Individual Freedom in Alexandria, Virginia; see the organization's highly informative website, <http://www.cfif.org> (last visited Jan. 29, 2002).

4. Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149 (1998).

millennial divide, Northwestern University Professor Steven Lubet (a close observer of judicial speech) offered his intriguing overview of emerging trends and prospects:

[T]here has been much litigation in recent years over the scope of judges' campaign speech. The clear trend has been toward broadening the range of permitted speech, but some restrictions still remain. There are good arguments on both sides of this issue. Restrictionists want to keep judging out of politics; campaigning judges want to inform the electorate. For the time being, it appears that the balance will tip in favor of speech, although it is possible that a series of excesses might swing the pendulum back toward constraint.⁵

Part I will review a series of decisions within the past half decade, most of which have been unreceptive to efforts to regulate judicial campaign speech. Part II focuses on issues that have been neglected, or inadequately recognized, by courts that have invalidated provisions of the Canons which regulate judicial campaign speech, and suggests a somewhat different balance, giving substantially greater emphasis to the paramount value of ensuring due process in our system of justice.

I. WHAT THE COURTS HAVE SAID: RECENT RULINGS ON JUDICIAL CAMPAIGN SPEECH

The tone for this new round of litigation was set in late March, 2000, by the first of two Michigan Supreme Court rulings that involved Judge John Chmura, a sitting district court judge in Warren County. Formal charges were brought against Judge Chmura on the basis of statements he made during an especially intense, and successful, campaign to retain the seat to which he had recently been appointed. The campaign materials were both laudatory of Chmura and disparaging of his challenger, a magistrate who was described in one flier as "facing trial for sexual harassment of a female court employee."⁶ Other statements strongly implied that Chmura's opponent (whose prior experience was more administrative than judicial) had been unacceptably soft on crime, warning voters "[t]hat's what happens when you put bureaucrats in charge of a court."⁷

Michigan's Judicial Tenure Commission (JTC)⁸ filed charges against Judge Chmura, citing four specific campaign statements. Each statement was alleged to violate Judicial Ethics Canon 7—specifically subsection 7(B)(1)(d), which provides in part that a judicial candidate

5. Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROB. 59, 62-63 (1998).

6. *In re Chmura*, 608 N.W.2d 31, 34 (Mich.), cert. denied, 531 U.S. 828 (2000).

7. *Id.*

8. The JTC is Michigan's government agency empowered to investigate charges of judicial impropriety, including those cited during campaigns for judicial office, and to recommend sanctions for misconduct if it finds misconduct to have occurred. See MICH. CONST. art. VI, § 30.

should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.⁹

Michigan's Supreme Court had adopted this language in 1995, only a year before the election to which it was now being applied. The new provision, which had been proposed by the assembly of the Michigan state bar, substantially amplified and extended a 1974 Canon; the earlier clause had simply cautioned judicial candidates not to "make pledges or promises of conduct in office . . . or misrepresent his identity, qualifications, present position, or other fact."¹⁰ The *Chmura* case now gave the supreme court its first opportunity to interpret and test the new language in the context of a real and highly contested case.

The challenged Canon, in the Michigan court's unanimous judgment, fell far short of acceptable First Amendment standards.¹¹ To be sure, the interests which the Canon claimed to serve could be deemed "compelling"—notably "preserving the integrity of the judiciary"¹² and, more precisely, "preserving public confidence in the judiciary."¹³ Later the court added, almost disparagingly, that such a rule "is intended to promote civility in campaigns for judicial office."¹⁴ Yet the challenged language failed a First Amendment test because it was "not narrowly tailored to further the state's compelling interests."¹⁵

The starting point for Michigan's high court was the U.S. Supreme Court's 1982 ruling in *Brown v. Hartlage*¹⁶ that states may not, under the First Amendment, broadly restrict the rights of candidates for elective office to make promises to voters and constituents. After barely acknowledging that *Brown* had involved the starkly different context of candidates and campaigns for *non-judicial* office, the Michigan court conceded that states do have a special interest

9. *In re Chmura*, 608 N.W.2d at 36 (quoting MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (1995)).

10. *Id.* at 36 n.4 (quoting MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1974)).

11. *Id.* at 33. Michigan's version of this constraint, like that adopted by several other states, was substantially more restrictive than the language of the ABA Model Code of Judicial Conduct. The ABA Model Code's pertinent provisions declared that judicial candidates shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i)-(ii) (2000).

12. *In re Chmura*, 608 N.W.2d at 40.

13. *Id.*

14. *Id.* at 43.

15. *Id.*

16. 456 U.S. 45 (1982).

in regulating the speech of those who seek election to the bench.¹⁷ Even so, the challenged portion of Canon 7 swept too broadly: “[It] greatly chills debate regarding the qualifications of candidates for judicial office. It applies to all statements, not merely those statements that bear on the impartiality of the judiciary.”¹⁸ The Canon which proscribed “factual omissions”¹⁹ also had an unacceptably broad reach. Given the grave risks of disciplinary sanctions which a transgression would incur, “a candidate’s safest course may sometimes be to remain silent on many issues.”²⁰

The Michigan Supreme Court’s view of the case and the Canons seems to have been shaped in part by a sense that elections for any contested public office are inevitably contentious. Though observing early in the opinion that “judges are different from legislative and executive branch officials,”²¹ the court insisted that such distinctions had very limited First Amendment significance: “That the candidate seeks judicial office does not change the nature of the candidate’s speech for First Amendment purposes.”²² Later in the opinion, the court offered a template of sorts for the regulation of judicial campaign speech:

A rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction. Such debate is impossible if judicial candidates are overly fearful of potential discipline for what they say. By chilling this debate, Canon 7(B)(1)(d) impedes the public’s ability to influence the direction of the courts through the electoral process.²³

The final disposition in the *Chmura* case was, not surprisingly, a narrowing of the scope of the challenged Canon, followed by a remand for reapplication of the more sparing language, rather than an outright dismissal.²⁴ Despite the First Amendment concerns that had swept away so much of the new provision, Michigan’s high court conceded there remained ample warrant for curbing judicial campaign statements that were *demonstrably false*, so long as an objective standard of falsehood governed—that is, so long as the charged statements were shown to have been “knowingly false or used with reckless disregard as to their truth or falsity.”²⁵ The Michigan court strongly suggested

17. *In re Chmura*, 608 N.W.2d at 42.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 39.

22. *Id.* at 40.

23. *Id.* at 42-43.

24. *In re Chmura*, 626 N.W.2d 876 (Mich. 2001). In this second round, two justices dissented. Though they fully concurred with the majority on the proper standard by which to review judicial campaign claims, they differed in regard to the application of that standard to one of the candidate’s statements which the JTC had cited.

25. *Id.* at 888.

that such a standard might be applicable to Judge Chmura's statements, since he had ample notice that such a limit might be imposed on his campaign rhetoric. The proper course was, accordingly, to remand the matter to the JTC for further proceedings under what remained of a substantially thinner and weaker Canon 7.²⁶

Despite obvious factual variations among judicial campaign cases, *Chmura*'s constitutional premises would soon extend far beyond Michigan. Several months later, in late August, 2000, a federal district judge in Atlanta considered the claims of Georgia Supreme Court challenger George M. Weaver.²⁷ In an unsuccessful campaign to unseat Justice Leah Sears, Weaver's campaign made, through television advertising, several accusations about his opponent's views on such issues as capital punishment and same-sex marriage.²⁸ The state's Judicial Qualifications Commission (JQC)²⁹ was asked to investigate Weaver's charges as putative violations of Canon 7. A three-member special committee was appointed by the Commission to determine, pursuant to the Commission's rules, whether the cited campaign statements violated Canon 7; if it found such a violation, the special committee could issue a "cease-and-desist request."³⁰ After investigation, the special committee found certain of Weaver's campaign statements noncompliant with the Canon, and issued a confidential cease and desist request, with which Weaver agreed to comply. He accordingly revised certain language in his campaign brochure, but then repeated much of his criticism of his opponent in a television ad.³¹

The special committee, having been charged to examine the content of the ad, found it to be in violation of the earlier order.³² Without giving notice to Weaver, the committee released its own public statement—less than a week before the election—declaring that Weaver's rhetoric breached the Canon since it was "unethical, unfair, false, and intentionally deceptive."³³ The release added, with specific reference to the cease-and-desist request, that the submitted television ad "was nothing short of an intentional and blatant violation of candidate Weaver's previous written assurance of his intent to comply with the Committee's original cease and desist request."³⁴

Justice Sears was shortly reelected by a narrow majority. Weaver had

26. *Id.* at 896-97.

27. *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000).

28. *Id.* at 1340.

29. The Commission had been created by constitutional amendment in 1972, and was empowered to investigate and make recommendations to the Georgia Supreme Court concerning the ethical conduct of judges and candidates for judicial office, including campaign statements. The Georgia Supreme Court adopted the Georgia Code of Judicial Conduct, formulated by the Commission, and empowered the JQC to enforce that code. *Id.* at 1339.

30. *Id.*

31. *Id.* at 1340.

32. *Id.*

33. *Id.* (quoting committee's statement).

34. *Id.* (quoting committee's statement).

already filed suit in federal court, between the special committee's release and the election.³⁵ He now insisted that, but for the Commission's intervention, Sears would not have garnered the requisite majority, and there would necessarily have been a run-off, in which he might well have prevailed.³⁶ That premise underlay a direct challenge to the constitutionality of Georgia's Canon 7, the language of which was similar in breadth and scope to Michigan's version, and more restrictive than the comparable provisions of most other states.

The district judge ruled substantially in Weaver's favor, relying heavily on the Michigan Supreme Court's First Amendment analysis in *Chmura*.³⁷ There was, of course, one major difference. While a state court would have been free to narrow—and thus to sustain, as modified—a portion of the challenged language, just as the *Chmura* court had done, a federal judge enjoyed no such flexibility. Moreover, the federal court in Atlanta, though agreeing with *Chmura* that false charges by a judicial candidate could be proscribed if they were proved to be “knowingly or recklessly false,” felt he had no comparable means of adding such protective language to a state's judicial ethics canon.³⁸

The only possible source of solace for the Georgia Commission came in the district judge's refusal to eviscerate completely its capacity to intervene in judicial campaigns, as the commission had done in the Weaver saga.³⁹ While such statutory authority could conceivably enable a state agency to take sides between candidates while voters were sorting out the issues, nothing in the First Amendment convinced this federal judge that “uninhibited, robust, and wide-open debate consists of debate from which the government is excluded, or an uninhibited marketplace of ideas one in which the government's wares cannot be advertised.”⁴⁰ While that part of the ruling might seem a pyrrhic victory for the commission, preserving its capacity to intervene during a contested campaign could have value beyond the immediate dispute.

Less than two months after the *Weaver* ruling, several candidates for Alabama judicial offices (and one incumbent judge) went to federal court seeking to enjoin certain regulatory initiatives of the state's Judicial Inquiry Commission (JIC).⁴¹ This body had promulgated enforcement policies, pursuant to Alabama's

35. *Id.*

36. *Id.*

37. *Id.* at 1342-43, 1346-47.

38. *Id.* at 1342-43.

39. *Id.* at 1344.

40. *Id.* at 1345 (quoting *Block v. Hase*, 793 F.2d 1303, 1313 (D.C. Cir. 1986)). Such a declaration masks some subtle problems which this court had no need to address. If, for example, the agency empowered to make such statements really were an official organ of state government, serious potential problems of “government speech” could arise from its active intervention in a closely contested campaign, seemingly taking sides between candidates. But the *Weaver* case did not pose such difficulties.

41. *Pittman v. Cole*, 117 F. Supp. 2d 1285, 1288-90 (S.D. Ala. 2000), *vacated by* 267 F.3d 1269 (11th Cir. 2001).

Canons of Judicial Ethics.⁴² One such provision had been construed to preclude judicial candidates from answering a series of questions which the Christian Coalition of Alabama planned to pose to judicial candidates as the basis for a “voter’s guide” to be published during the campaign. The Commission concluded that most, if not all, the proposed questions asked judicial candidates to “make a promise of conduct in office or to announce in advance your conclusions of law on issues you would be called upon to decide as a judge”⁴³ with the result that a candidate’s response would inevitably violate Alabama’s Judicial Ethics Canon 7. The plaintiff candidates and the Coalition promptly filed suit in federal court against the Commission, claiming a breach of First Amendment rights.⁴⁴

Much of the district judge’s opinion dealt with procedural issues such as standing and justiciability.⁴⁵ Despite the “non-binding” nature of the Commission’s advisory opinions, the court found the candidates’ claims properly before a federal tribunal, and ruled that the plaintiffs did indeed have standing to raise such constitutional challenges.⁴⁶ On the merits, the district court found the Commission’s posture incompatible with judicial candidates’ First Amendment interests: “Here, the Plaintiffs are not only subject to self-censorship, but additionally risk disciplinary action for what might later be deemed entirely ethical conduct.”⁴⁷ Since the Christian Coalition had proposed substantial changes in the questionnaire, on which the Commission had not yet ruled, the district judge stopped short of deciding the merits.⁴⁸ The opinion left little doubt, however, which way the merits would be resolved if the Commission persisted in its view of the application of Canon 7 to such an inquiry and potential candidate responses. Had the court reached the merits, it would presumably have barred the enforcement of the Canon to deny a willing judicial candidate an opportunity to respond to such questions posed by interest groups to those seeking election to the bench.

Alabama would become the venue of another celebrated judicial campaign dispute, in which both federal and state courts eventually ruled. In the summer of 2000, Justice Harold See of the Alabama Supreme Court sought the Republican Party’s nomination for the post of chief justice.⁴⁹ During his campaign, See made certain critical public comments about his opponent, Judge

42. The JIC traced its origins to the 1901 Constitution, which empowered the JIC to enforce the Canons of Judicial Ethics and to investigate charges of impropriety. If it found a violation of the Canons, the JIC could file a formal complaint with the Court of the Judiciary, which would adjudicate the charge and “after notice and public hearing” could censure, suspend or remove a judge or fashion a lesser sanction. *Id.* at 1291-92.

43. *Id.* at 1295.

44. *Id.* at 1288.

45. *Id.* at 1295-1307.

46. *Id.* at 1307.

47. *Id.* at 1310.

48. *Id.* at 1311.

49. *Butler v. Ala. Judicial Inquiry Comm’n*, 111 F. Supp. 2d 1224, 1226 (M.D. Ala. 2000).

Roy Moore.⁵⁰ The JIC was asked to determine whether See's statements impugning Moore's (allegedly lenient) disposition of drug offenders violated the canons of judicial ethics.⁵¹ The agency agreed with the complainants, and filed with the Court of the Judiciary a formal complaint against Justice See, citing what it perceived to be false information, uttered with knowledge or in reckless disregard of the truth, and therefore in violation of Canon 7.⁵² Pending resolution of the complaint, pursuant to provisions of the Alabama Constitution, Justice See was immediately disqualified from further judicial duties on the supreme court.⁵³ Meanwhile, a similar complaint had been filed with the Alabama Judicial Campaign Oversight Committee, an unofficial bi-partisan monitoring or watchdog group, which dismissed the charge.

Joined by a fellow judge, and a registered voter named Robert Butler (whose name would caption the case), Justice See filed suit in federal court to overturn the Commission's actions on First Amendment grounds.⁵⁴ After a preliminary ruling in the plaintiffs' favor,⁵⁵ the case was appealed to the Eleventh Circuit. Rather than reaching the merits, the federal appeals court certified to the Alabama Supreme Court several key questions.⁵⁶ The state's highest court issued its response on May 15, 2001, and accepted substantially all of the plaintiffs' claims.⁵⁷ As its starting point, the Alabama Supreme Court observed that the state's citizens had long ago "chosen to select their judges in partisan, contested elections"⁵⁸ with the result that "judicial candidates [should] have 'the unfettered opportunity to make their views known' so that voters may intelligently evaluate

50. Specifically, in a thirty-second television spot comparing his record on crime to that of his opponent, Justice See's campaign charged that Judge Moore had on at least forty occasions given reduced sentences or probation to convicted drug dealers.

51. *Butler*, 111 F. Supp. at 1227.

52. *Id.*

53. *Id.*

54. *Id.* at 1228.

55. *Butler v. Ala. Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1241 (M.D. Ala. 2000), *vacated* by 261 F.3d 1154 (11th Cir. 2001).

56. *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257 (11th Cir. 2001). The certified questions asked:

A. In a proceeding before the Alabama Court of Judiciary, can a defendant raise and have decided a constitutional challenge to a judicial cannon, either at the Court of the Judiciary or through direct review to the Supreme Court or by other means?

B. If so, how do the procedural rules governing the Court of the Judiciary permit a reasonably speedy decision on federal constitutional issues?

C. In a proceeding before the Alabama Court of Judiciary, can that court or a higher court grant, in that proceeding, a stay of the judge's disqualification pending the outcome of the federal constitutional challenge posed in that proceeding?

Id. at 1265-66.

57. *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001).

58. *Id.* at 214.

candidates' positions on issues of vital public importance."⁵⁹

Acknowledging that a state has a substantial compelling interest in "protecting the integrity of the judiciary,"⁶⁰ the court concluded that Alabama's Canon 7 went well beyond the needs of such an interest. Following the analysis employed by the Michigan Supreme Court, the Alabama Supreme Court found *Chmura* persuasive, even if not (given important factual and procedural differences) quite controlling.⁶¹ The Alabama justices invoked *Chmura* primarily to invalidate on First Amendment grounds the basic constraints of the local Canon 7. They also followed Michigan's lead in recasting the challenged language, narrowing Alabama's version of Canon 7 so that it would reach only the knowing or reckless utterance of false statements.⁶²

One Alabama justice was unwilling to save the Canon even to this extent; for him, the potentially valid language could simply not be severed from the invalid, and the entire Canon should be declared beyond redemption.⁶³ The *Butler* case has now presumably returned to the federal courts, though few issues remain in doubt. Whether any further action might be contemplated with respect to Justice See remains an intriguing question. After all, the Alabama JIC (unlike the Michigan JTC) had couched its initial complaint in the very terms—knowing or recklessly false charges—which survived the process of constitutional challenge.

The news thus far in the millennium has been fairly dismal for those who seek to regulate judicial campaign speech. There is, however, one bright spot in the constellation. The Federal Court of Appeals for the Eighth Circuit, a month before the Alabama Supreme Court's *Butler* ruling, departed sharply from what seemed a chorus of skeptics, and upheld Minnesota's Judicial Canon 5 (which covers much the same ground as Canon 7 in other states).⁶⁴ A group of judicial candidates and others, including the state Republican Party, challenged Minnesota's non-partisan judicial election system on First Amendment grounds.⁶⁵ Specifically, they attacked a Canon which barred judicial candidates from attending and speaking at partisan political gatherings, identifying their membership in a political party, or authorizing or knowingly permitting others to do so on the candidate's behalf.⁶⁶ The district court dismissed the complaint,

59. *Id.* at 215.

60. *Id.*

61. *Id.*

62. *Id.* at 215-19.

63. *Id.* at 220 (Johnstone, J., concurring in part and dissenting in part).

64. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001). On December 3, 2001, the United States Supreme Court granted certiorari, though limiting the scope of its review to the constitutionality of the Minnesota Canon provision which prohibits judicial candidates from "announc[ing] his or her views on disputed legal or political issues," the so-called announce clause, which the Eighth Circuit had sustained toward the end of its opinion, noting that "the announce clause, as construed by the district court, is narrowly tailored to further compelling governmental interests." *Id.* at 883.

65. *Id.* at 859-60.

66. *Id.* at 859.

and the court of appeals affirmed.⁶⁷

The First Amendment claims were substantial, and since the Canons were clearly content-based, they were properly subject to strict scrutiny.⁶⁸ Giving substantial deference to Minnesota's history and tradition of conducting its judicial elections on a non-partisan basis, the appeals court found the Canons to be no broader than necessary to serve substantial state interests in an independent, non-partisan judiciary, and preserving public confidence in the courts.⁶⁹ All the relevant precedents were fully canvassed and, since many courts had reached starkly different conclusions, most needed to be distinguished.⁷⁰

The *Republican Party of Minnesota* ruling is notable in several respects, apart from its outcome. The opinion is by far the longest and most elaborately reasoned of any of the judgments on these issues. The record developed in the district court substantially documented the nature, extent and importance of the governmental interests to which the Canons were addressed, as well as the inefficacy of less restrictive alternatives.⁷¹ Moreover, the court received a remarkable array of views from myriad amici, including some of the usual suspects (e.g., Campaign for Justice, the Minnesota State Bar Association and the state ACLU), but also from improbable parties such as the Muslim Republicans, Republican Seniors and the Indian-Asian-American Republicans.⁷²

The tone of the opinions at both levels differed sharply from the view most other courts have recently taken of judicial campaign speech. The district court was at least willing to find some virtue in the state's electoral policies and structure, and anxious to do whatever a federal court could constitutionally do to save that system.⁷³ In that spirit, the district judge did construe quite narrowly the canon which bars candidates from "announcing" positions on public issues, ruling that such a curb was means only to cover issues likely to come before the court on which the candidate sought a seat.⁷⁴

Most important, the Eighth Circuit ruling parted company from the other recent cases in crucial ways. First, the court recognized that Minnesota had long ago opted to elect its judges, but found in that historic commitment no imperative that the state and its voters tolerate no-holds-barred campaigns.⁷⁵ If a state wished to have its judges elected, and insisted they face the electorate, though without party labels or affiliations, that was not an illogical or untenable

67. *Id.* at 860.

68. *Id.* at 864.

69. *Id.* at 885.

70. *Id.* at 871-72. *Cf. Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (striking down a state law which barred candidates in primary elections from claiming endorsement by a political party).

71. *See Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 974-80 (D. Minn. 1999).

72. *Id.* at 968-70.

73. *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875, 878-80 (D. Minn. 1998).

74. *Id.*

75. *Republican Part of Minn.*, 247 F.3d at 865-68.

arrangement.⁷⁶ Moreover, the *Republican Party of Minnesota* court refused to accept at face value persistent claims that the challenged Canons were broader than they needed to be in order to serve state interests which every other court had conceded *arguendo*, but to which few had given comparable deference.⁷⁷

Instead, the Eighth Circuit demanded of the challengers a quality and depth of proof which the record had apparently lacked. At one point, the court chided the plaintiffs: "In contrast to the evidence amassed by the Boards [supporting the Canons], the plaintiffs have not adduced evidence tending to disprove the threat to the integrity and reputation of the judiciary from involvement with partisan politics."⁷⁸ And, with reference to a specific "less restrictive alternative" which the plaintiffs had cited as arguably adequate to meet the state's needs, the court noted they had failed to show just how "the canon restricting candidates from manifesting bias or prejudice inappropriate to judicial office fully protects the State's interests."⁷⁹ Thus the burden of proof seemed to fall quite differently in the Eighth Circuit from its locus in other cases; rather than accepting facial challenges with little deference to state interests, *Republican Party of Minnesota* seemed almost to reverse the values.

Nonetheless, in certain respects, the *Republican Party of Minnesota* ruling fell short of expectations one might have had of the only court in recent times to look with any sympathy upon state efforts to restrict judicial campaign rhetoric. The Eighth Circuit gave little deference, for example, to the most basic of interests invoked in support of restraint during judicial elections. Though much had been written about those interests in the mid and late 1990s,⁸⁰ the *Republican Party of Minnesota* opinion framed the issue in a curiously insular fashion, almost as a peculiarity of one state's preferences for how its judges would seek and retain office.⁸¹ Thus the one recent ruling that proponents of reform might cite as a victory turned out to be substantially less than complete.

Before concluding this brief review of recent developments in the courts, several observations may be useful. It is hardly surprising that challenges have succeeded most readily in Michigan, Georgia and Alabama; the *Chmura* court noted that these were three of the four states, along with Ohio, which "impose broad restrictions on a candidate's speech."⁸² These states had gone beyond the Model Code by adopting language designed to reach judicial campaign claims "that the candidate knows or reasonably should know is false, fraudulent, misleading . . . or . . . omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified

76. *Id.* Cf. *Geary v. Renne*, 880 F.2d 1062 (9th Cir. 1989) (recognizing a state's interest in impartial and nonpartisan government as a constitutionally valid basis for a ban on printing in ballot materials the party affiliations of candidates for any elective office).

77. *Republican Party of Minn.*, 247 F.3d at 872-75.

78. *Id.* at 870.

79. *Id.* at 878, 902.

80. See *infra* notes 92, 93-97 and accompanying text.

81. *Republican Party of Minn.*, 247 F.3d at 857.

82. *In re Chmura*, 608 N.W.2d 31, 37 n.6 (Mich.), *cert. denied*, 531 U.S. 828 (2000).

expectation about results the candidate can achieve.”⁸³ Thus the narrowing of the challenged language—to cover only those false statements that were made knowingly or recklessly—essentially brought that portion of the Canons into line with the reach of other states. That narrowing process did invite further review in *Chmura* itself, though it is less clear whether the Alabama proceeding will still go forward under the narrow standard, since the initial charges against Justice See were couched in the terms which the state supreme court eventually found acceptable.⁸⁴

In a different sense, the array of interests that were invoked in most of these cases to support the challenged restrictions seems curiously superficial. Sometimes the state’s claim has been characterized as no more compelling than a civic desire to “maintain civility in judicial elections”⁸⁵—an interest not likely to trump major free speech claims. Even in *Republican Party of Minnesota*, where the Canons prevailed, there was relatively little advanced to support regulation beyond “integrity of the judiciary” and “public confidence in the courts.”⁸⁶ As we shall shortly observe, a far stronger case could have been, and in the future could still be, advanced in support of such restrictions—a case which would at least make the balancing process considerably harder than it has been in the recent cases.⁸⁷

Two factors—process and partisanship—may also help to explain the curious hostility of some courts toward regulatory reforms in this area. Recall the fate of Justice See, the principal challenger to the Alabama Canons.⁸⁸ The mere filing of charges by a special committee created by the state’s JIC, under Alabama rules then in force, required See’s immediate disqualification from any further service on the state’s highest court. Such a sanction was not part of the Canons, of course, but rather an eccentricity of Alabama’s procedure.⁸⁹ In its amicus curiae brief to the Eleventh Circuit, the Center for Individual Freedom expressed understandable alarm over the procedures in the case, warning that “such pre-adjudication punishment based on the mere possibility of having made false or misleading political statements severely burdens the First Amendment rights of [judicial] candidates.”⁹⁰

Whether or not judges ought to enjoy *more* procedural protection than other candidates who are accused of distorting an opponent’s record, there seems little warrant for granting them *less* process. There seems a certain irony in summarily disqualifying a member of the state’s highest court at so early a stage. Though nothing in the Alabama court’s ruling specifically cited a due process concern,

83. *Id.* at 36.

84. *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 215-19 (Ala. 2001).

85. *See, e.g., In re Chmura*, 608 N.W.2d at 40, 43.

86. *See Republican Party of Minn.*, 247 F.3d at 864.

87. *See infra* notes 104-09 and accompanying text.

88. *Supra* notes 49, 50-63 and accompanying text.

89. ALA. CONST. amend. 328, § 6.19.

90. Brief of Amicus Curiae Center for Individual Freedom, at www.cfif.org/pdfs/ButlerAmicusFinal.pdf, *Republican Party of Minn.*, 247 F.3d 854 (8th Cir. 2001) (No. 00-14137-D).

See's fellow jurists could not have been unmindful of its absence.

The role of partisan politics may also have played a negative role in such litigation. The *Butler* case again is illustrative.⁹¹ Though Alabama judges run for office under party labels, the susceptibility of the campaign regulation process to partisan influence and control may have made the defense of that process more difficult. The Center for Individual Freedom, in its amicus brief, was highly critical of the potential for partisanship in the enforcement process, noting that Justice See's plight was the result of "charges . . . brought against a controversial Republican jurist whom the long-dominant Democratic establishment opposed, [and] it was brought by a JIC composed overwhelmingly of Democratic political appointees . . . after a bipartisan Commission failed to find fault with the challenged advertisement."⁹² Again, the *Butler* opinion did not expressly reveal any such concern, although the strikingly low level of deference to the state's regulatory interests, and to the enforcement process, might possibly reflect the court's unstated anxiety about partisanship as well as about process.

Balanced against such negative factors is at least one positive element found in the *Republican Party of Minnesota* case, the sole recent victory for the Canons.⁹³ The Eighth Circuit devoted considerable attention to the long and consistent history of Minnesota's commitment to non-partisan judicial elections.⁹⁴ Not only in the recital of the facts, but throughout the opinion, the appeals court could not say enough good things about the clarity and consistency of the state's policies, noting how firm had been the state supreme court's conviction, "[l]ong before the present canons were adopted . . . that merely avoiding party designations on the ballot was insufficient to protect the Minnesota judiciary from the dangers of partisan involvement."⁹⁵

Here a contrast between states again seems helpful. Recall the circumstances of the *Butler* case in Alabama.⁹⁶ A bipartisan commission had declined to charge Justice See with violating the canons, after appraising his campaign rhetoric. However, the JIC went full speed ahead, imposing the harshest possible sanction in the very first complaint to be filed under the recently revised Canon 7(B)(2). Such a tortuous course invited the charge—again from the Center for Individual Freedom's brief—that the state's claimed interest in curbing judicial campaign rhetoric "is undercut by Alabama's inconsistent pursuit of that interest."⁹⁷ While consistency may seem a virtue more germane to Minnesota's climate and culture than to Alabama's, the lesson should not be lost on proponents of regulation.

Finally, the recent cases have revealed a curious disdain for the uniqueness of judicial office, and thus of those special regulatory interests which apply to the

91. *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257 (11th Cir. 2001).

92. Center for Individual Freedom Amicus Curiae Brief, *supra* note 90.

93. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001).

94. *Id.* at 864-68.

95. *Id.* at 869.

96. *Supra* notes 49, 50-63 and accompanying text.

97. Center for Individual Freedom Amicus Curiae Brief, *supra* note 90.

conduct of judicial election campaigns. Several courts that have shown such hostility to the Canons have relied on the Supreme Court ruling most closely on point, *Brown v. Hartlage*,⁹⁸ almost heedless that the case involved outright promises made by one who was seeking a *legislative* office—surely protected speech when uttered by a county board aspirant, but unthinkable from a judicial candidate.

Typical of such confusion is a 1998 Sixth Circuit case,⁹⁹ focused on sanctions appropriate for allegedly excessive campaign expenditures. Along the way, the court rejected in this fashion the claim—advanced by defenders of Ohio's canons—that judges and the way they campaigned were fundamentally different:

Although Defendants cite several cases to support their argument that there is a distinct difference between judicial officers and political officers, this Court finds that an election candidate does not forego his or her First Amendment rights simply because he or she decides to seek a judicial office, rather than a non-judicial one.¹⁰⁰

Whatever the commonalities among seekers of elective public office, such disdain for crucial differences between judges and others who campaign for votes reveals how great the need is for further education of those who bear the ultimate responsibility for regulating this process.

II. THE FUTURE OF JUDICIAL CAMPAIGN SPEECH: WHAT THE COURTS HAVE NOT SAID

Before looking to the future, I want to offer a few working premises: First, let us assume that most state judges will continue to be elected, and that any systemic reforms that may be adopted will not diminish the need for attention to the rhetoric of judicial campaigns. Second, the likeliest near-term reforms of the current judicial campaign system—public financing, most notably—will have little impact on the quality of campaign rhetoric, or on the impetus for its regulation.¹⁰¹ Third, legal challenges to the constitutionality of regulatory measures such as the Canons are almost certain to continue, and indeed to intensify, if only at the behest of new and spirited players in the field, including the Center for Individual Freedom, many of which strongly oppose current curbs on judicial campaign speech.

Fourth, public confidence in the judiciary and its integrity will remain a fragile commodity, not likely to be enhanced by public exposure to intemperate exchanges between contentious candidates for the bench. Finally, the quality of election rhetoric in judicial campaigns will almost certainly get worse before it

98. 456 U.S. 45 (1982).

99. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998).

100. *Id.* at 529.

101. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849.

gets better; recent movement in some states toward the lowest common denominator are unlikely to reverse or abate within the foreseeable future.¹⁰² Thus the challenges on which I focus here are surely not going away, and in several respects are likely to become more acute in the years immediately ahead.

With these assumptions on the table, there seem several promising elements in developing a sounder and more promising approach to the regulation of judicial campaign speech.

A. Judges Are Different from Other Electoral Candidates in Ways the Courts Have Yet to Recognize

A central irony is that, rather like the proverbial fish who is the last to discover water, it is judges who seem most reticent to proclaim the uniqueness of the judiciary. Thus, the roster of valid and substantial interests which are potentially served by regulating judicial campaign speech has been curiously truncated, in ways that may help explain the disappointing fate of the Canons in recent litigation. Courts on both sides of the issue have largely confined their analysis to such interests as “judicial integrity” or “public confidence in the judiciary,” with occasional slighting references to a nostalgic desire for “civility in judicial campaigns.”¹⁰³

While these interests are hardly insubstantial, they do not adequately cover the field. As Indiana Chief Justice Randall T. Shepard has shown so forcefully, there is much more that needs protecting through regulation of judicial campaign rhetoric than in the control of elections for any other office, and the interest in providing such protection goes very far beyond the image of the bench.¹⁰⁴ The core concern is nothing less than ensuring due process for litigants; Chief Justice Shepard rightly warns that courts which appraise the validity of campaign limits solely in terms of “the appearance of impartiality and the dignity of the legal profession”¹⁰⁵ miss most of the point. He asks, rhetorically, whether a court that reviews a challenge to the Canons should confine its attention to a free speech claim, or “should the judge place more value on the ability of courts to afford litigants due process of law in individual cases, and affirm the canons designed to prevent political speeches that will diminish the courts’ ability to render impartial justice and their ability to be viewed as impartial?”¹⁰⁶ To that question, the proper answer is surely not elusive.

Chief Justice Shepard’s broader focus is no longer his alone. A very recent article notes, with understandable alarm, that

102. This prospect seems a central premise of the recent report to the House of Delegates of the American Bar Association Commission on Public Funding of Judicial Campaigns, A.B.A. J., September, 2001, p. 21.

103. See, e.g., *In re Chmura*, 608 N.W.2d 31, 40, 43 (Mich.), cert. denied, 531 U.S. 828 (2000).

104. See generally Shepard, *supra* note 2.

105. *Id.* at 1090.

106. *Id.* at 1090-91.

[i]n most cases [dealing with judicial election speech] courts have failed to recognize that the goal of the Canon is to protect the right to a fair trial. Unless this is seen as a goal, courts will never focus on whether candidate statements indicate a predisposition to a particular litigant.¹⁰⁷

One federal district judge, a decade ago, got it right: “[T]here is a compelling state interest in so limiting a judicial candidate’s speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system.”¹⁰⁸

Adding to the judicial campaign speech equation such a concern for due process does not, of course, inevitably alter the outcome when a regulation is challenged. Surely a due process claim in no way blunts the force of a candidate’s well stated First Amendment challenge to a broad restriction on campaign rhetoric. Yet express recognition of due process as the most vital of state interests does enhance the case for regulation, and thus ensures greater parity of interests in a balancing process which Judge Richard Posner well described a decade ago:

[T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech.¹⁰⁹

Judges are very different from the general run of elected officials in other respects as well. As Professor Roy Schotland has forcefully shown in a recent chapter on judicial campaign finance, we tend often to overlook or devalue distinguishing factors that bear directly on the regulation of campaign rhetoric.¹¹⁰ Schotland notes these differences as relatively obvious, but readily neglected: fundraising by judges is uniquely constrained; “other elected officials are open to meeting—at any time and openly or privately—their constituents or anyone who may be affected by their action in pending or future matters;” “nonjudicial candidates [are free to] seek support by making promises about how they will perform;” “[o]ther elected officials are advocates, free to cultivate and reward support by working with their supporters to advance shared goals;” “[o]ther elected officials pledge to change law, and if elected they often work unreservedly toward change;” “other elected officials participate in diverse, and usually large multi-member bodies;” other elected incumbents build up support through “‘constituent casework,’ patronage, securing benefits for communities,

107. Max Minzner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 228 (1999).

108. *Ackerson v. Ky. Judicial Ret. & Removal Comm’n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991).

109. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993).

110. Schotland, *supra* note 101.

etc.,” and almost all other elected officials face challenges in every election.¹¹¹

So broad an array of vital (if obvious) differences should play a central role in any court challenge to the Canons—and all the more so because those who decide such cases are themselves, as judges, most familiar with the uniqueness of their roles within the public sector. Curiously, such profound differences as these are rarely mentioned as reasons why states might curb judicial campaign rhetoric in exceptional measure. The relative obscurity of such desiderata—indeed, the basic premise that “judges are different”—remains one of the quandaries of this field of litigation.

Recognizing that judges do differ in myriad ways from other elected officials should shape in several ways how courts, whether in deciding cases or promulgating rules of ethics, will approach possible challenges to the Canons. The analogies on which many rulings have relied simply do not fit. For example, reliance on the Supreme Court’s sole seemingly pertinent judgment, *Brown v. Hartlage*,¹¹² is grievously misplaced. The Court’s concern there was for the campaign speech of a candidate for a county commission, who had been barred from making certain promises to his constituents.¹¹³ Writing for a unanimous Court, Justice Brennan stressed the obvious truth that, in executive and legislative campaigns “some promises are universally acknowledged as legitimate [because] . . . [c]andidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote.”¹¹⁴

How any thoughtful judge could derive from that ruling any possible guidance for cases that involve judicial campaign speech seems baffling—yet more than one court considering a challenge to the canons has found in *Brown* a useful analogy, without even noting the stark contrast between one who campaigns to become a county commissioner and one who seeks to become or remain a judge.

Other analogies which lower courts have occasionally invoked seem equally fragile. Some cases have looked to regulation of lawyer advertising, or to curbs on attorneys’ out-of-court comments on pending cases. While the latter analogy might possibly lead a court better to appreciate the due process concern noted earlier, that does not seem to have happened.¹¹⁵ Moreover, the analogy to curbs on attorney advertising offers substantially less promise, dealing as it does with commercial speech as a less than fully protected form of expression, and in a very different setting. Nor is there much to be gained by the possible analogy, which a few courts have invoked, to the Supreme Court’s deference toward laws

111. *Id.* at 857-61.

112. 456 U.S. 45 (1982).

113. *Id.* at 47-48.

114. *Id.* at 55-56.

115. See generally Matthew J. O’Hara, Note, *Restriction of Judicial Election Candidates’ Free Speech Rights After Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT L. REV. 197 (1994).

that are designed to keep partisan politics out of the civil service.¹¹⁶ Not only do such policies apply uniquely to non-elected officials; they are designed to avoid the very exposure to politics that creates the need to regulate the rhetoric of judicial elections. Ironically, the one case (*Republican Party of Minnesota*)¹¹⁷ that upheld a non-partisan judicial election system and therefore might benefit from such an analogy, did not find it especially useful.

Finally, the law of defamation, to which several courts have looked, is also not very helpful. The interests served by permitting recovery for false statements—protecting and vindicating reputation from the harm that libel or slander imposes—are very different from the rationale for limiting false and misleading claims by judicial candidates. The concern of the Canons is not that a candidate's *reputation* will suffer if false charges go unchecked among judicial candidates, but more basically, the concern is that the integrity of the selection process itself will be impaired, as well as the actual or apparent capacity of the winner to ensure due process for future litigants. The requirement which some courts have imposed that campaign charges not only be false, but that they be made with knowledge of their falsehood or reckless disregard thereof, does borrow a possibly useful analogy. However, this requirement invokes a standard that is applicable here for quite different reasons.

Suffice it to say that, for campaign speech regulation purposes, judges are much more different than virtually all the courts deciding such cases have acknowledged. It might be useful here to recall the eloquent words of Justice Felix Frankfurter, dissenting in *Bridges v. California*:¹¹⁸

[J]udges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.¹¹⁹

What seems largely missing in the judgments to date, and seems vital to future litigation about judicial campaign speech, is a recognition by courts and judges themselves of the measure of these differences, and of the bearing they should have upon the balancing process that must be followed in any such case. Had such an expanded approach been part of the recent litigation, a different outcome might or might not have resulted. But at least we would all have a far higher degree of satisfaction than the actual recent cases have created.

116. *E.g.*, *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 868-69 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001).

117. *Id.*

118. 314 U.S. 252 (1941) (Frankfurter, J., dissenting).

119. *Id.* at 283.

B. Elections Are Different, Especially for Judges

Curbs on judicial campaign speech have, quite understandably, posed for many courts the specter of broadly curtailing or inhibiting all judicial speech. At a time of unprecedented debate about the extent to which judges should be free to explain to the media how their courts work, or to offer public views on issues remote from their own dockets, the potential link is unavoidable. Professor Stephen Gillers, in a recent *New York Times* column, has clearly stated the larger dilemma of regulating judicial speech:

Free speech for judges brings benefits and dangers. On one hand, judges can increase general understanding of the law and legal institutions. Silencing them would deny the public much wisdom. On the other hand, no asset is more precious to the judiciary than public confidence that judges are above the fray, with no personal stake in how cases are decided. In this contest between speech and keeping the public's trust, judicial conduct codes generally opt to protect trust. They presume that when judges talk to the media about their own cases, they jeopardize that trust, even if their language is measured and restrained.¹²⁰

The critical issue for us is when and how far, if at all, regulation of judicial *campaign* speech necessarily inhibits the ability of judges to speak in ways that offer the beneficial effects of which Professor Gillers writes. Most courts that have been asked to appraise judicial campaign curbs have tended to blur, or even ignore, that distinction. Several seem to have invalidated campaign speech restrictions partly because of a broader perceived threat to general judicial speech. That nexus is wholly understandable, and offers insight into some of the recent rulings. But the case remains to be made that the two areas are fully separable, so that regulation of campaign rhetoric need pose no threat to the free speech of judges at other times.

Several factors argue for treating judicial election campaigns differently both from elections for any other public office, and from other events in the life of a judge. For starters, judges need not be elected, as a small minority of states and Article III of the U.S. Constitution recognize in mandating alternative modes of judicial selection. Nor is it necessary (again with reference to the federal judiciary and Article III) that judges serve limited terms and be re-approved on some periodic basis. While it would be unthinkable for a state to resolve that its governor should be chosen by his or her predecessor, or that, once in office should serve for life (subject only to impeachment), the choice of means and terms for judicial office-holders obviously includes options that would be deemed unacceptably undemocratic in either of the other branches. If judges inherently need not be elected, or subject to periodic reelection, it should follow that a wider array of choice accompanies the commitment of a state to make its judicial offices elective.

120. Stephen Gillers, *For Justice to Be Blind, Must Judges Be Mute?*, N.Y. TIMES, Mar. 4, 2001, § 4, at 3.

Moreover, the very nature of a judge's or judicial candidate's relationship to the electorate is profoundly different from that of any other public official. The process of communication with a judge is utterly unlike dealing with a legislator or executive officer; anyone who seeks or holds office in the latter two branches is fair game for entreaties of all sorts, as much during election campaigns as at any other time. For judges and those who seek to become judges through popular support, the dynamics are utterly different in myriad ways. To illustrate with one obvious but helpful example: If a candidate for legislative or executive office makes promises during a campaign, voters naturally expect the fulfillment of those promises, or at least a conscientious effort at fulfillment. Consistent and unexplained failure to deliver on campaign pledges marks a dereliction on the part of elected officials. For a judicial candidate, our expectations are precisely the opposite; the most basic reason we do not wish those who seek judicial office to make promises to voters is that their fulfillment by a successful candidate would most clearly compromise the fairness and objectivity of the bench on which our system of justice depends.

Quite as clearly, the incentives on both sides of the political relationship are profoundly different when the office is judicial; were a judge or one who wishes to become a judge able to make promises, or constituents able to invite promises, the delicate balance which must be obtained between a judge and the rest of society would be imperiled beyond recognition. Thus the activities which a judicial candidate is permitted to pursue during a campaign are already circumscribed to a degree, and in ways, that affect no other seekers of public office. As Professor Roy Schotland has noted:

In all but four of the thirty-nine states with judicial elections, a legally binding Canon of Judicial Conduct bars personal fundraising and requires that all fundraising be done by committee And in at least twenty-four states, the law limits the time period during which fundraising is permitted, both before and after the election.¹²¹

Such widespread prophylactic policies as these recognize not only that judges and judicial candidates are different in many respects from those who seek other elective offices, but that judicial elections and campaigns are even more distinctly different from other elections and campaigns. Since that contrast has been appropriately recognized for other purposes, drawing a distinct line between judicial speech during a campaign and at other times should not pose an undue challenge.

There is another, concededly more practical, consideration. The interests that underlie restricting campaign speech do not apply, or apply in somewhat attenuated form, to other judicial activity and expression. It is therefore unnecessary to constrain non-campaign judicial speech to nearly the same degree. In cases of the type Professor Gillers mentions,¹²² where a judge simply wishes to inform the reading or viewing public about how courts work, or to offer

121. Schotland, *supra* note 101, at 857.

122. Gillers, *supra* note 120, at 3.

abstract views on legal issues unlikely ever to appear on that judge's docket, the absence of concerns comparable to those that arise during a campaign should be evident.

Take the intriguing case of New Jersey trial judge Evan Broadbelt.¹²³ Several years ago, the New Jersey Supreme Court insisted that Judge Broadbelt relinquish his immensely popular Court TV commentator role, even though he scrupulously avoided topics on which he might ever have to rule.¹²⁴ Such a sanction not only deprived viewers of an invaluable source of insight into the mysterious workings of the judicial system—the O.J. Simpson criminal case or the trial of the Menendez brothers, for example—but, from the judge's perspective, seemed quite remote from those interests that would warrant limits on judicial campaign speech.¹²⁵

Judicial speech cases of another and more controversial type are less readily dismissed. Consider the experience of Justice Richard Sanders of the Washington Supreme Court.¹²⁶ Moments after he had sworn the oath of office in 1995, for a six-year term, Sanders addressed a nearby rally sponsored by an anti-abortion group who had been prominent among his supporters. In his brief remarks, he observed: "Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life."¹²⁷ Later, he added, "I owe my election to many of the people who are here today."¹²⁸ In closing, Sanders declared: "Our mutual pursuit of justice requires a lifetime of dedication and courage,"¹²⁹ for which he urged his supporters to "keep up the good work."¹³⁰

Charges were brought against Justice Sanders by Washington's Commission on Judicial Conduct, which argued he had violated several Canons of Judicial Ethics, including having engaged in political activity to a degree beyond the bounds of Canon 7.¹³¹ Eventually a group of retired judges, sitting pro tempore as the Washington Supreme Court, rejected the Commission's charges.¹³² This court concluded that Sanders's comments had not violated the canons, since nothing he said at the rally amounted to an "express or implied promise to decide particular issues in a particular way, or as an indication that he would be unwilling or unable to be impartial and follow the law if faced with a case in which abortion issues were presented."¹³³

123. *In re Broadbelt*, 683 A.2d 543 (1996), *cert. denied*, 520 U.S. 118 (1997).

124. *Id.* at 544.

125. The present author was counsel to Judge Broadbelt in the United States Supreme Court, and filed a certiorari petition on his behalf.

126. *In re Disciplinary Proceeding Against Sanders*, 955 P.2d 369 (Wash. 1998).

127. *Id.* at 371.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 377.

133. *Id.* at 376. For a thoughtful discussion of judicial speech issues, including both the

Language in the Washington court's opinion might imply that the outcome would have been the same even if Sanders' statements had been made during his election campaign. Any such implication seems dangerous, and misses the crucial distinction between the campaign period and what happens after the election. Had Sanders made the same statements as a candidate, the implied promise to approach abortion and related issues in a certain way should at least evoke grave concern, and quite possibly sanctions for a breach of Canon 7.

Indeed, some who oppose broader latitude for judicial speech are understandably troubled by the *Sanders* ruling, even on its facts. They caution that the statement was not entirely removed from the political/electoral context, and that even a state supreme court justice might not only seek reelection, but might campaign for some other office to which non-election appeals to voter emotions could pose a danger. Nonetheless, the making of such statements after a successful candidate has assumed office poses a different and lower level of risk, albeit close to the line even for an incumbent. Nor should the disposition be different if one assumes that a judge, once having been elected, will probably seek reelection and may aspire to a higher bench; the longer time cycle for the judiciary usually provides greater protection than exists for other elective offices.

Even in cases of the *Sanders* type, tolerating judicial speech outside the election cycle is readily distinguished from regulating statements made by a candidate during a campaign. What a *judge* says to like-minded citizens, wholly outside the campaign cycle, and thus remote from the pressure and incentives that accompany campaigns, even if the subject matter is an issue that could appear on the speaker's docket, does seem to pose a lower level of risk (and therefore concern) than does the same statement made by a *candidate* who is actively seeking electoral support. Accordingly, regulation of judicial campaign speech need not and should not imply any general dilution of judicial speech. The two issues are distinct, if related, and should be kept separate in our analysis.

CONCLUSION

The potential for future discussion and regulation of judicial campaign speech seems immense, if largely uncharted. The courts have thus far divided on relatively subordinate or ancillary issues, such as the vagueness or precision of language that restricts judicial campaign speech, or the procedures by which a judicial candidate may be formally taken to task. While these questions are hardly trivial, neither are they central in defining the degree to which government may go in curbing the rhetoric of those who hold or seek judicial office. Whatever may follow, it is past time to recognize the ways in which, and the degree to which, judges and judicial candidates differ from those who seek any other public office. Even within the judicial branch, one must recognize how profoundly different the campaign period is from every other time in a judge's life. Finally, the rationale for restricting judicial rhetoric is no longer (if it ever

was) a matter of image or even of public confidence. What is at stake here is no less than the promise of fairness, impartiality, and ultimately of due process for those whose lives and fortunes depend upon judges being selected by means that are not fully subject to the vagaries of American politics.

“IF ELECTED, I PROMISE []”— WHAT SHOULD JUDICIAL CANDIDATES BE ALLOWED TO SAY?

STEPHEN GILLERS*

Once we step off the curb into the traffic of the popular election of judges, judicial campaign speech presents a challenge of some complexity. I put aside the First Amendment and whatever limits it might impose as a matter of constitutional law, on whatever speech restrictions we might be inclined to impose as a matter of sensible policy. I defer to Professor O’Neil’s excellent analysis on the constitutional issues.¹ I suppose I hope that in the end the First Amendment’s application to campaign speech will be construed to reflect sensible policy. But what is a sensible policy? Oddly, the source of the complexity is simple to identify even if the solutions are not.

In this short Article, I will propose a rule for judicial candidates that balances several competing interests. The rule seeks to honor their First Amendment rights and the voters’ need for information while avoiding a level of specificity that may signal how a judicial candidate would decide a particular case. Along the way, I consider rules that would permit less judicial speech and eventually reject these in favor of a more permissive rule.

We have here an “on the one hand, on the other hand” dilemma. On the one hand, a popular election means that voters will pick judges. In making those choices, they need information. Traditional résumé facts—education and work experience—may be helpful, but only modestly. The same is true for party affiliations. Rational choice requires more. Voters will want to know something about the candidates’ approach to law and their positions on legal issues of concern to the voter. We cannot give voters the job of picking judges and then deny them the kind of detail that a responsible person would want to have to fulfill the assignment conscientiously. It is no answer to say we never desired to give them this job in the first place. We have assumed the popular election of judges and we must now find the right balance between voter information and the values of the judicial process and therefore due process.

But what more information can we give? Or to put it another way, what more should we allow the candidates to tell? This is “the other hand.” Certainly, the candidate cannot say how he or she would vote on a particular case, either a hypothetical case or one that may be headed toward the court for which he or she is a candidate, or any other court for that matter. Professor O’Neil’s due process concern is the strong policy interest, and therefore the constitutionally

* Vice Dean and Professor of Law, New York University School of Law. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. See generally Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

appropriate state interest, for forbidding such pledges.² Judges decide cases at the end of a formal process that envisions, among other things, rules of evidence, standards of advocacy, opposing arguments, deliberation, and a mind open to persuasion. This is the process litigants are due. A commitment to decide a particular case in a particular way is the antithesis of the judicial process.

No one will take issue with either end of the spectrum. It is rather between them, between the candidates' vitae (allowed) and a promise of a future vote in a particular case should it arise (forbidden), that trouble starts. In examining this problem, let us focus on the criminal law because the criminal law is most likely to win public attention and is therefore the arena where candidates are most likely to try to distinguish themselves. Let me offer you several hypothetical examples which I hope are realistic.

Imagine that in a controversial opinion, a state high court has given state citizens broader protections under a state constitutional provision than are afforded in corresponding provisions of the Federal Constitution. Maybe the state high court has held that to defeat the defendant's privilege against self-incrimination, a prosecutor must offer transactional, not merely testimonial, immunity, making the state constitution more protective than the U.S. Constitution.³ Maybe the state high court has reached that decision in the context of a homicide prosecution that has drawn public attention. And maybe the result of that ruling freed the killer. Tempted to exploit the publicity, can a candidate for a seat on the state high court reveal her doubt about that result, explaining in some scholarly detail why the state high court may have misconstrued the state's privilege against self-incrimination and interpreted it too broadly? Maybe she does this only in response to a reporter's question, which in a heated election is nearly inevitable. Our candidate does not promise to vote to overturn the holding in a future case. Whether in her view *stare decisis* counsels acceptance of it is a different question, which she would decide if and when it is presented and argued. Rather, her public statements are historical. She has read the high court's opinion and wants voters to know she finds it analytically and historically weak. She says that she would have been inclined to reach the opposite result.

If you think of law as a body of rules, you might imagine a case as a syllogism with a major premise, a minor premise, and a conclusion. The major premise is the legal rule. The facts of the particular case constitute the minor premise. The conclusion is the verdict or judgment or the ruling on appeal. In my hypothetical, our candidate says nothing about an actual case as such because she says nothing about facts or a minor premise. She addresses only the major premise, the legal rule. Further, she has not said what her vote would be on that rule should it thereafter come before the court for which she is a candidate in the form of a case, but only what her position on the rule, the major premise, would likely have been were she on the court when the question was actually presented. If the criticism is leveled that the candidate is revealing a view without having

2. *Id.* at 716.

3. *Kastigar v. United States*, 406 U.S. 441 (1972) (the U.S. Constitution requires only testimonial immunity).

been participant to the process that led to it, she might reply that in fact she has read all the briefs, and all sources cited in the briefs, and attended the oral argument. True, she did not participate in the court's deliberation, but what of it? That was not possible because she was not on the court. The public, she will say, is entitled to her views based on the access she could enjoy at the time, and to the extent that her absence from the deliberations somehow makes these views "incomplete" or subject to revision, she will readily agree. The voter will still have more information about her than if she said nothing at all. Our candidate might add that this information is especially important because it addresses a state constitutional provision, where the state high court is often the final voice.

This discussion so far might lead us to the following conclusion:

A candidate for judicial office may state his or her likely views on a rule of law already decided by the court for which he or she is a candidate or by a higher court.

The touchstones for (or limits to) this proposition are, first, that the rule of law has already been decided and, second, that the candidate is addressing only a rule of law, the major premise of the syllogism that defines a case.

But let us test those limits by eliminating the "already decided" requirement. Assume now that our candidate has studied the question and concluded that not only was the state high court wrong to interpret the state's privilege against self-incrimination to require transactional immunity, but she is also inclined to conclude that few if any of the state's constitutional criminal procedure rules should be read more expansively than the protections in the Federal Constitution. We are still talking about rules of law, the major premise, but now some of the rules have yet to be decided by the court the candidate seeks to join. But neither are we talking about cases. Any case can still be decided one way or another depending on the other legal questions it contains.

Let's make the hypothetical even more difficult (or less difficult, depending on what you believe). There is headed to the state high court a notorious criminal case in which one of the arguments advanced by defense counsel is that his client was denied his rights under the state and federal confrontation clauses. If our candidate is permitted to state her likely view that state constitutional provisions should in the main be read as coterminous with their federal counterparts, then she is saying, at the least, how she is likely to vote on that precise issue in the notorious case. I say "likely to vote" because our candidate does not promise to vote one way or the other on the issue, nor has she said whether she believes either confrontation clause was violated. She has merely expressed her doubt about the argument in favor of a broader reading of the state constitutional provisions, while adding that she will keep an open mind on the issue when she reads appeal briefs arguing otherwise. Such a statement is not duplicitous. We know that lawyers and judges are honestly able to approach an issue inclined in one direction and then have their minds changed. (Perhaps you are reading this Article just that way right now.) In our case—and I add this fact just to make the question even more troublesome—assume that the candidate has been a law professor at a law school in the state. One of her courses is a seminar on state constitutional law. Two years ago, she wrote a leading article on the intersection

of state and federal constitutional protections in criminal cases in which she has already expressed the very same views.

We might say that campaign statements like this one cross the line, that they offer too much even if they do not contain a promise to vote in a particular way on a particular legal question. But is that right? If our candidate's scholarship stakes out the same position, if she has, for example, actually written a law review article critical of the methodology of the very court she seeks to join, what is the value of denying her the right to explain the position she has already taken? One might argue that statements the candidate has made as a commentator on the law are in a different category from statements she might make as a candidate for a judicial post because the latter carries the implication of a promise, even if it does not contain a guarantee. I develop this argument below. But let me first take the hypothetical in a different direction to test our intolerance for statements that go beyond commenting on what the court has "already decided," assuming we are prepared to go even that far.

Assume it was the opposing candidate who wrote the court's opinion finding that only transactional immunity can override the assertion of the state's privilege against self-incrimination. In this opinion, he explained the doctrinal and historical basis for a more expansive reading of the state constitutional protection and this explanation is broad enough to apply to other (as yet unconstrued) provisions of the state constitution. So, the opponent's position is public knowledge (including the methodology through which he reached it and which may bear on how he will interpret other state constitutional provisions in the area of criminal procedure, including the state's confrontation clause). There is no doubt about what *he* thinks. Surely, the informed voter who wishes to exercise her vote responsibly will be interested in this record and will also want to know how, if at all, the challenger's position on the same issues (and methodology) may differ. Should we deny the voter that information and the challenger the right to offer it, still limited to what I have been calling the major premise?

Now, consider this final variation. The incumbent did write an opinion on the scope of state constitutional protection and found that protection greater than the national Constitution affords. However, the opinion was a concurrence, not an opinion for the court, and it arose this way:

In the particular case, the appellant alleged that his conviction violated his rights under the federal and state confrontation clauses. A unanimous state high court upheld the challenge in two opinions. Four judges found a violation of the Federal Constitution and did not reach the state claim. Three concurring judges concluded that the Federal Constitution did not afford the claimed protection. They then proceeded to analyze the state constitutional claim and decided, first, that the state confrontation clause afforded greater protection to an accused and, second, that it was violated. The author of that concurrence is now running for re-election against a candidate who disagrees with its reasoning and result. Can the challenger say so and explain why? More is now at stake. Since the opponent's opinion is only a concurrence, it is not a holding of the court and *stare decisis* is irrelevant. So when the challenger states her view, she is revealing a position that she is free to adopt as a judge without any precedential restriction. In fact, if elected, she may have the opportunity to vote that position

(and persuade a majority to agree) in the same case should the U.S. Supreme Court overturn the state high court's application of the Federal Confrontation Clause and remand the case for further proceedings under state law. Of course, our candidate will say that she will be open to having her view changed if and when the issue is again argued in the high state court. Paradoxically, this may make her vote somewhat less predictable than the vote of the incumbent she opposes, who has already reached the contrary conclusion on the question as a judge in the very case.

These examples might lead us to broaden the rule describing the statements a judicial candidate will be allowed to make:

A candidate may reveal her likely views, without committing herself to a particular vote, on any major legal premise, civil or criminal.

A candidate would have this authority whether or not her opponent has, as a judge, written on the question. Although I just assumed that the opponent has written judicial opinions on the subject, and so the electorate already knows what at least one candidate believes, what difference should that make? An intelligent voter would want to consider both (or all) candidates' positions on these major premises in deciding whom to choose. The assumption that another candidate is a judge who has written on the question is merely a heuristic device to test our tolerance for permissible disclosure. It cannot sensibly be a pre-condition to an opponent's right to reveal her view. It would be an odd rule that said that one candidate could give her view on an issue only if another candidate has already expressed a view on that issue in a judicial capacity.

Now let us consider the arguments against permitting judicial candidates to reveal, even tentatively and generally, their views on a major legal premise. Even a tentative commitment to a major legal premise is inappropriate. While not binding, and often not even a reliable predictor of how a judge will apply that premise to the facts of a particular case (where it will have to be reconciled with other major premises), even a tentative commitment will make it harder for the candidate, as a judge, to change her mind on the particular question. People like to be, and like to appear to be, consistent and reliable. While they may be willing to change their minds on occasion, and acknowledge as much, they will not publicly do so often. Because it is human nature to be, and to endeavor to appear to be, consistent and reliable, when we allow judicial candidates to state their views on legal questions, we run the risk of denying a future litigant a totally open mind. Moreover, even if our judge really would have a totally open mind, and would not be swayed by the ordinary desire to be viewed as consistent and reliable, it may not necessarily appear that way to the public. We all know that the appearance of justice is either as important as justice or at least a close second. Finally, although I have been examining a rule of law and not a case, the resolution of a rule of law one way or another is tantamount to deciding a case that turns only on that rule of law.

So if we give credence to these values, our rule should be:

No judicial candidate may state his or her views on any legal rule that could come before the court for which he or she is a candidate.

This rule of silence, as I will call it, would apply even to a candidate who has already been a judge and has already participated in deciding a case encompassing the particular rule. Our position would have to be that in the context of a campaign, as opposed to the context of adjudicating a case, candidates for judicial positions must not discuss or reveal their views on legal rules that could come before them. While this position is a bit artificial, if one, both, or all candidates have already revealed their views on legal rules in cases they have already decided, or in scholarly articles, the greater goal of insuring the fact and appearance of open-mindedness requires us to accept the artificiality, because there is no comfortable stopping place once we begin to make exceptions.

I promised not to discuss the First Amendment dimensions to a rule of silence, nor will I, but it seems to me that any First Amendment analysis has to take into consideration the practical coherence of a rule of silence. Can it work? It can work in the sense that the candidates can actually be silenced, but will their silence achieve our objective? Perhaps most critically, we have to recognize that the voices in judicial contests are not only those of the candidates. Third parties, including well-funded interest groups, can and will speak to the merits, or perceived demerits, of particular candidates, especially if (for the advocacy groups) the contest is viewed as important to their goals. And of course nothing can be done to prevent third-party speech. We can expect that these other voices will identify and publicize writings and statements of the candidates, whether as judges or otherwise, and will say what these pronouncements "mean" for the resolution of issues deemed important to the speakers and their audience. Of course, these third parties may or may not be right about what the candidates' pronouncements mean, but the greater point is that they will be characterizing the candidate's views on particular legal issues. In short, the candidates' silence will not stop the debate. Are we to say that the candidates must behave as though there were no debate? Perhaps a third party's characterization of the candidate's views are wrong. Can the candidate not correct it? Can she do so through a surrogate? Either way, can she do so without violating the rule of silence? If we create an exception to a rule of silence to allow for rebuttal or reply, the exception would devour the rule. True, a different third party might correct, or at least respond to, an alleged mischaracterization. But, does it not seem odd that a public debate will go on about a candidate's views, presumably of some interest to the electorate, without the voice of the candidate?

Third parties have another cheap and powerful way to influence elections—endorsements. Even if an interest group does not presume to describe a candidate's views, it may identify the candidates it supports and opposes, perhaps in mailings to members, perhaps more broadly. When voters hear that a group favoring or opposing reproductive freedom, gun control, stringent environmental protection, school prayer, or capital punishment favors a particular candidate, little more needs to be said. The endorsement is a shorthand way of saying to voters:

"We care about this issue. We know this issue. We have made it our business to find out how this person will decide this issue. And we're

telling you that if you agree with our group's position on this issue, this is the person you want (or don't want) on the bench."

General circulation newspapers are also likely to take an interest in judicial races, certainly those for a state's high court, and profile candidates in news columns—which may describe their presumed judicial "philosophies"—and favor particular candidates in editorials.

In light of these various opportunities for third-party (including press) activity, how can we deny candidates the freedom to speak about legal issues? It is like playing a Bach symphony while limiting the first violinist to a single note. Yet perhaps there remains a rational basis for making this distinction. As stated, an individual candidate's statements create the risk of commitment to a position and the appearance of a commitment, while the same cannot be said of a third party's statement (unless authorized by the candidate). In other words, when the candidate offers his or her view on a legal question, we cross a Rubicon that we avoid when third parties speak, even when those third parties offer the candidate's words, written or uttered before he or she became a candidate.

Whether or not this distinction is persuasive to lawyers and whether or not the electorate will appreciate it, a rule of silence has another problem. It can be used opportunistically by candidates who are not judges to the disadvantage of candidates who are judges running for reelection or election to a higher court. For example, potential candidate John Marshall plans to run for the state supreme court in three years. He knows that once he becomes a candidate, the rule of silence will prevent him from telling voters his position on legal rules that he anticipates will be of interest to them. In the ensuing two and a half years, he publishes various articles in bar journals and the popular press expressing his position on those issues. No one can stop him. Once he declares his candidacy, the rule of silence may forbid him to say anything about the issues, but he does not need to do so. He is already on record. Meanwhile, his opponent, if a sitting judge or a lawyer without Marshall's foresight, can say little or nothing about his own position or critique the Marshall position. Conversely, a sitting judge can, in anticipation of a future election, freight an opinion with statements that the judge as candidate could not make, but which others will then be able to showcase as the judge's "philosophy." I do not suggest that the judge must vote or reason one way or another in order to employ this strategy. The judge need only modulate the voice and phrasing of an opinion for campaign use. These vehicles are malleable enough, regardless of the judge's vote and logic.

A rule of silence can be used opportunistically in another way. If Marshall's opponent is Judge Story, Marshall might review Story's opinions and find a few where the immediate result of a ruling will engender voter alarm even if the rationale for the ruling was compelling. Suppose Story wrote an opinion reversing the conviction of a defendant whose crime was especially heinous. Or perhaps Story wrote an opinion invalidating the state's capital punishment law based on U.S. Supreme Court precedent that experts conclude left Story little or no choice. Nevertheless, campaign sound bites can take these and similar hot button rulings and paint Story in a very bad light. "Story freed murderers." "Story threw out the state's death penalty, emptying death row." "Story favored

criminal rights over victim rights.” Marshall never has to detail his own positions on the legal rules in these cases. With a rule of silence, Story will find it hard or impossible to respond to the charges. Perhaps we will forbid Marshall to run these ads—though I would question the validity of the prohibition if the statements are true—but we cannot stop third parties acting on their own.

A candidate (or his or her supporters) can behave opportunistically in yet a third way. If they can afford it, we can expect advertisements that encourage voters to draw (perhaps unfounded) conclusions about the candidate’s judicial attitudes while scrupulously avoiding mention of an actual position on any issue that may come before the court. We are all familiar, I trust, with the sort of television advertisements in which a prison door slams shut and a voiceover tells us that candidate Story is tough on crime (or words to that effect). While these advertisements can be run whatever the rules—and the capacity to generate variations on them is seemingly endless—a rule of silence will prevent an opponent from responding with an actual discussion of the criminal justice issues the advertisement viscerally suggests. If the opponent can also afford it, of course, we’ll get competing advertisements with slamming prison doors or their equivalent. If the opponent cannot afford it, or if he or she is a sitting judge and finds the strategy inappropriate, the advantage is clear. Either outcome is at odds with the idea that important decisions about governance ought to be based on substance, not image.

To recapitulate: For the following reasons it makes sense to allow judicial candidates for popular election to state their likely positions on legal rules.

- One or more candidates may already have staked out positions on those rules in judicial decisions or other written or oral statements and they should be accorded the opportunity to explain their position if the issue arises. At the same time, the opponent should be able to give her position on the same rules.
- An opponent can exploit a rule of silence by generally characterizing the decisions of a sitting judge or by pointing out the effects of an unpopular decision without regard to its precedential necessity. A prospective candidate can also circumvent a rule of silence in anticipation of a contest and before the rule can legally be imposed. A sitting judge can do this in opinions, anticipating a later campaign. Dramatic advertisements using symbols but no ideas offer a third way to imply a message while saying nothing substantive.
- Third parties, including the press and interest groups, cannot be silenced and will be free to endorse or oppose candidates and characterize a candidate’s positions.
- The electorate has a legitimate interest in information that will allow it to cast intelligent votes. Limiting this information to résumé facts and general promises (“I will vigorously enforce the law to protect the citizens of this state from vicious criminals”) does not invite intelligent choice.

Of these four arguments in favor of allowing judicial candidates freedom to speak about particular legal issues, the first three arguments say, in effect, that the conversation will go on anyway, accurately or not, so there is little to be gained from denying candidates the ability to join it. Little, but not nothing. The argument for drawing the line at candidate speech is that it is especially likely to commit, or appear to commit, a candidate to a position on legal issues that we

wish judges to resolve only in the context of the facts of actual cases and after a legal process constructed to ensure the fact and appearance of fairness. No matter how fierce the public debate, no unauthorized third party can commit a candidate. Excluding the candidate, then, goes part way toward addressing this concern.

Whether or not you find this distinction persuasive, and I do not, we must still address the fourth argument, that is the voters' desire for information. I believe the voter must be allowed to hear about the candidates' substantive positions from the candidates themselves. I say this for two reasons. The lesser reason takes account of third party dissemination of information about the candidates. Although the existence of these sources may not, standing alone, be justification to abandon a rule of silence, their presence creates the danger of confusion or misinformation that the candidates are best able to clarify or dispel, directly or through surrogates. A more cogent, though related, argument in favor of modifying the rule of silence is the voters' need to make an informed choice. It is disingenuous (and perhaps insulting) to ask voters to choose judges and then deny them the minimal information needed to distinguish candidate Marshall from candidate Story.

Absent information about a candidate's views on legal questions that may come before his or her court, voters will have to rely solely on information whose relationship to professional merit is often marginal—party affiliation, advertisements that emphasize symbols and dramatic scenes, the ethnic identity of candidates, and endorsements. I do not suggest that allowing candidates to talk about legal issues will displace these other strategies for encouraging voter allegiance. But a more permissive rule may improve debate about policies and ideas—resulting, one may hope, in an elevated contest and a better educated electorate. We have made the choice to trust voters to pick judges. We must, I think, now trust and encourage them to do so wisely.

These considerations lead me to propose yet another rule:

A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views are tentative and subject to arguments of counsel and deliberation.

One advantage of this rule is that it permits speech to a point, but requires a disclaimer, which the First Amendment may tolerate more readily than a broader restriction on speech.⁴ By using the word "general," I mean to find a balance between the voters' need for information on one hand and the avoidance of a level of specificity that may signal how the candidate will decide a particular case, on the other. For example, while a candidate could advance a belief,

4. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which upheld a state court rule requiring lawyers who advertise contingent fee services to reveal that, in accord with another rule, the client will be responsible for costs even if the client loses the litigation. It is true that this case concerned commercial speech, which enjoys less protection. However, it is plausible that given the state's heightened interest in the integrity of electoral contests, and perhaps judicial contests in particular, the courts will uphold a provision mandating the stated disclaimer.

subject to argument and deliberation, that the state constitution is more protective of certain rights than the Federal Constitution, he or she could not go further and apply a designated state constitutional provision to particular facts, not even hypothetically. To put it another way, a candidate might, with the required disclaimer, advance the belief that the state constitution's prohibition against unreasonable searches is more protective of privacy than the Fourth Amendment to the U.S. Constitution, but the candidate could not describe a particular search and say whether it would violate state law.

In this discussion, I have tried to state a rule that will honor the values of the judicial system (including the due process rights of future litigants) while respecting the voters' need for information that will permit responsible election choices. Canon 5A(3)(d)(ii) of the A.B.A.'s Model Code of Judicial Conduct impedes the latter goal.⁵ It forbids judicial candidates to "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."⁶ This language tilts heavily toward the presumed interests of the justice system. My proposal, impelled by both pragmatism and respect for the needs of voters, tries to reduce that tilt somewhat. Surely, my language can be improved, surely we can tinker with the balance, and surely any rule that addresses this boundary will entail fine distinctions about which we must expect reasonable disagreement. But that is true for all rules of professional conduct cast as standards. Deleting the reference to "issues" from the Code formulation will go some way toward ameliorating the balance.

5. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1978).

6. *Id.*

RESTRICTIONS ON THE SPEECH OF JUDICIAL CANDIDATES ARE UNCONSTITUTIONAL

ERWIN CHEMERINSKY*

INTRODUCTION

Although there are many disagreements about the First Amendment, no one denies that political speech is at the very core of what is constitutionally protected. Government-imposed, content-based restrictions on the speech of political candidates, in virtually any circumstance, are unconstitutional. Such speech provides the voters with crucial information to evaluate candidates and thus directly furthers the democratic process.

I have long believed that the Model Code's restrictions on speech by candidates for judicial office¹ are unconstitutional under basic First Amendment principles. The judicial canons represent content-based restrictions on political speech. I therefore applaud recent decisions invalidating these provisions.² The government should not prohibit candidates for elected office from discussing issues related to the voter's choice.

I was surprised to read Professor O'Neil's defense of these restrictions.³ Although I usually agree with his constitutional analysis, here I believe that he underestimates the First Amendment interests of judicial candidates and overestimates the harms of allowing such speech. Simply put, my position is that if states are going to make judges and judicial candidates into politicians by requiring them to run for office or retention, then these individuals should have the same basic right to free speech as all others standing for election.

I always have found the idea of judicial elections problematic. Voters rarely know enough about judicial candidates to make a knowledgeable choice. There is an inherent tension between judicial elections and judicial independence; inevitably judges' decisions might be influenced by the likely impact at the next election. Otto Kaus, a former member of the California Supreme Court, remarked that "deciding controversial cases while facing reelection" is like having an alligator in one's bathtub; it is impossible to forget that it is there.⁴

* Professor, University of Southern California Law School. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by grants from the Program on Law & Society of the Open Society Institute, and the Joyce Foundation. Subsequent to the writing and presentation of this Paper, the Supreme Court granted review in *Republican Party of Minnesota v. Kelly*, 247 F.3d 54 (8th Cir. 2001), *cert. granted*, 122 S. Ct. 643 (2002).

1. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2000).

2. See, e.g., *In re Chmura*, 608 N.W.2d 31 (Mich.), *cert. denied*, 531 U.S. 828 (2000).

3. Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

4. See Gerald F. Uelman, Symposium: *The Future of State Supreme Courts as Institutions in the Law: Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts*

The need for judicial candidates to raise ever increasing amounts of campaign funds when their primary financial supporters are lawyers and litigants is inimical to judicial independence. I will never forget the words of a highly respected California Superior Court judge describing how judges sit in their lunchroom and talk about which firms are likely to donate the most money only to go back on the bench and hear cases involving lawyers from those very same firms.

Allowing judicial candidates to speak of what they will do on the bench troubles me for all of the reasons Professor O'Neil describes.⁵ But to me, this is just one of the problems of turning judges into politicians. If a state chooses to have judges elected or retained by the voters, then the electorate should have the necessary information to make an informed choice.

I agree with Professor O'Neil that judicial elections are here to stay;⁶ there is no indication that states with such systems for choosing and retaining judges are likely to abandon them. The vast majority of states have judicial elections because of a belief that judges as government officials should be accountable to their constituents. By making this choice, the states, by definition, are turning judges into politicians. Having done so, states should not be able to keep judges and judicial candidates from speaking about the key issues that are likely to matter to the voters.

In responding to Professor O'Neil's thoughtful Paper, I will identify the major issues in the debate over speech in judicial campaigns. At the very least, my hope is that this will make the areas of agreement and disagreement clearer. Also, I think that this approach will explain why I believe that Professor O'Neil fails to give sufficient protection to the First Amendment interests of candidates and voters in the judicial election process.

I. AN INDIVIDUAL'S VIEWS AFFECT HOW HE OR SHE ACTS ON THE BENCH AS A JUDGE

It seems so obvious that it is hardly worth stating; yet, the reality that an individual's views affect how he or she acts on the bench as a judge must be the starting point in discussing judicial selection. Long ago, the legal realists exploded the myth of formalism and mechanical judging. Judges often have discretion in deciding the content of legal rules and in applying them to specific cases. Of course, there are many cases where any judge would arrive at the same conclusion. But that does not deny that discretion is inherent to judging.

The beliefs and views of a judge inevitably influence how that discretion will be exercised. For example, believing that many drug laws are misguided,

in an Era of Judicial Politicization, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

5. O'Neil, *supra* note 3. O'Neil argues that the primary reasons for restricting judicial candidate speech are to maintain civility in the judicial election process, *id.* at 712, 715, preserving judicial integrity, *id.* at 715, limiting potential partisanship, *id.* at 713, and ensuring due process for litigants, *id.* at 715.

6. O'Neil, *supra* note 3.

especially those concerning simple possession, as a judge I would use whatever sentencing discretion I possessed to impose minimal punishments for such offenses. But a judge with a different view likely would impose, to the extent allowed by the law, much harsher punishments for the same offenses.

To pick an example from civil litigation, under current law, a state can require parental notice and/or consent for an unmarried minor's abortion, but only if the law provides a judicial bypass procedure where the girl can obtain an abortion by demonstrating to a judge that the abortion is in her best interest or that she is mature enough to decide for herself.⁷ If I were a state court judge, I am sure that I would always grant the minor's request when seeking an abortion over her parents' objections by finding that an abortion was in her best interest. Undoubtedly, a judge holding strong anti-abortion views would come to opposite the conclusion in many, if not all, of the cases.

II. THOSE SELECTING OR EVALUATING A JUDICIAL CANDIDATE SHOULD CONSIDER THE VIEWS OF THE INDIVIDUAL AS THEY RELATE TO LIKELY PERFORMANCE ON THE BENCH

There are three possible models for evaluating judicial candidates. One approach would focus solely on the individual's professional qualifications. The evaluator—be it the President, the Senate, the governor, or the voters—would be limited to looking at the candidate's education and experience. A second possible approach would allow consideration of likely judicial temperament, as well as professional qualifications. A final model would permit consideration of a judicial candidate's views and ideology, as well as professional qualifications and judicial temperament.

Past fights over judicial selection and retention have been implicitly about which model should be followed. In 1986, conservatives seeking to deny retention to California Supreme Court Justices Rose Bird, Joseph Grodin, and Cruz Reynoso urged that they be rejected because of their anti-death penalty views. Opponents of these justices clearly took the third approach and urged their defeat on ideological grounds. In contrast, their supporters argued that judicial independence was endangered by such an approach of judicial candidate evaluation and that the justices should be retained because of their impeccable professional qualifications and unquestioned judicial temperament.

A year later, the ideological roles were reversed. Robert Bork was opposed and ultimately defeated because of his restrictive views about the scope of constitutional rights. His defenders argued that it was inappropriate to use ideology as a basis for evaluating a nominee; they urged his confirmation because of his stellar professional qualifications and abilities.

I engaged in countless public debates during 1986 and 1987 concerning the California retention election and the Bork nomination. I supported Bird, Grodin, and Reynoso; I opposed Bork. Not surprisingly, my opponents in these debates

7. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Bellotti v. Baird*, 443 U.S. 622 (1979).

often were the same. It was ironic to hear those opponents who urged rejection of Bird, Grodin, and Reynoso because of their anti-death penalty view argue that Bork's ideology should not be a consideration. The experience caused me to believe that the views of all candidates for judicial office—state or federal—need to be considered in the selection process.

The same irony has been replayed at the federal level in recent years. In 2001, Republicans said that it was inappropriate for Democrats to use ideology as a basis for rejecting President George W. Bush's nominees for the federal bench. But shortly thereafter, Republicans in the Senate did exactly that in evaluating President Bill Clinton's choices.

Presidents have always used ideology as one criteria in selecting judges. Some Presidents care more and some less, but never have judicial candidate or nominee views been irrelevant in the selection process. Likewise, the United States' Senate has always considered a nominee's views as part of the confirmation process. Early in American history, the Senate rejected President George Washington's selection of Supreme Court Justice John Rutledge to replace John Jay as Chief Justice. This was entirely because of the Senate's disagreement with Rutledge's views about an important issue of the time, the country's neutrality as to the war between England and France.⁸ About twenty percent of presidential nominees for the Supreme Court have been rejected by the Senate, as have many selections for the lower federal courts.⁹ This percentage does not even reflect the individuals who were not nominated because of likely ideological opposition in the Senate.

Nor is this phenomenon any different at the state level. In states where the governor appoints judges, selection often includes consideration of ideology. California Governor Grey Davis has been emphatic in his declaration that he will only select judges who will enforce the death penalty and California's three-strikes law.

A judicial candidate's ideology is an appropriate consideration in any judicial selection process for the obvious reason that it reflects how the person will likely decide cases. This is not to lessen the importance of professional qualifications and judicial temperament; they obviously are always considerations. But they alone are not sufficient for evaluating judicial candidates.

Nor is this situation any different if the selection of a judge is made by the voters instead of a chief executive. For the same reasons that a President or governor looks to a judicial candidate's ideology, the voters—in an election or retention election—are justified in doing so.

8. See LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 79-80 (1985).

9. See *id.* at 78.

III. THE RESTRICTIONS ON SPEECH IN THE MODEL CODE OF JUDICIAL CONDUCT PREVENT JUDICIAL CANDIDATES FROM EXPRESSING THEIR VIEWS AND THUS VOTERS FROM LEARNING OF THEM

The Model Code regulates the speech of candidates for judicial office. Canon 5(E) is explicit that a successful candidate who violates this rule is “subject to judicial discipline for his or her campaign conduct.”¹⁰ It also provides that “an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct.”¹¹

The Model Code expressly limits what candidates for judicial office can say. Canon 5(A)(3)(d) says that candidates shall not:

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or
- (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.¹²

As Professor O’Neil points out, some states go even further in regulating political speech of judicial candidates.¹³ The Michigan provision invalidated in *Chmura*, for example, prohibited candidates from making statements that they “should know [are] false, fraudulent, misleading, deceptive or which contains a material misrepresentation of fact or law . . . or which is likely to create an unjustified expectation about results the candidate can achieve.”¹⁴

By their very terms, these provisions limit what candidates for judicial office can say about their views. For example, a candidate for a state criminal trial court could not say, “I will be tough on drunk drivers,” or “I will not sentence people to prison for simple possession.” A candidate for an appellate court cannot express views about issues likely to come before his or her court.

Perhaps I am reading the words “pledges” or “promises,” and “commit” or “appear to commit” as used in Canon 5A(3) too expansively. Maybe the words could be interpreted to prohibit speech only if the judge expressly issues a “pledge,” “promise,” or “commitment.” The problem is that the provision can be understood as broadly prohibiting any expression by a judicial candidate of intended acts once on the bench. In fact, the commentary to this provision in the Model Code supports an expansive reading. It says: “Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the

10. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2000).

11. *Id.*

12. *Id.* at Canon 5A(3)(d).

13. O’Neil, *supra* note 3, at 703 n.11.

14. *In re Chmura*, 608 N.W.2d 31, 33 n.7 (Mich.), *cert. denied*, 531 U.S. 828 (2000).

court.”¹⁵ In other words, it is not limited to prohibiting “pledges,” “promises,” or “commitments”; it forbids any speech that “appears” to commit the candidate. Any statement by a judicial candidate of intended conduct in office would fall within this category of prohibited speech. Indeed, any statements by a judicial candidate about his or her views on issues likely to come before the court are prohibited. If I understand Professor O’Neil correctly, he would support such a prohibition.

Even if I am incorrect and the provision in the Model Code is meant to have a more limited application restricted to literal pledges or promises, the vagueness in its language is likely to chill speech during election campaigns. At the very least, the provision is unclear about what constitutes a “pledge,” “promise,” or “commitment.” This inherent uncertainty results in the risk of chilling constitutionally protected speech. The Michigan court, in *Chmura*, relied heavily on this concern. It explained:

A rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of the individual judges in contributing to that direction. Such debate is impossible if judicial candidates are overly fearful of potential discipline for what they say. By chilling this debate, [the provision] impedes the public’s ability to influence the direction of the courts through the electoral process.¹⁶

IV. THE RESTRICTIONS ON SPEECH ARE CONTENT-BASED RESTRICTIONS ON POLITICAL SPEECH

Especially in recent years, the Supreme Court has emphasized that the starting point in free speech analysis is ascertaining whether a law is content-based or content-neutral. In general, content-based restrictions on speech must meet a strict scrutiny standard, while content-neutral laws have to meet only an intermediate scrutiny standard.¹⁷

The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject-matter neutral.¹⁸ “Viewpoint neutral” means that the government cannot regulate speech based on the ideology of the message.¹⁹ For example, it would be clearly unconstitutional for the government to say that pro-choice demonstrations are allowed in a park, but anti-abortion demonstrations are not allowed. In *Boos v. Barry*, the Court declared unconstitutional a District of Columbia ordinance that prohibited the display of signs critical of foreign governments within 500 feet of

15. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) cmt. (2000).

16. *In re Chmura*, 608 N.W.2d at 42-43.

17. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

18. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983).

19. *See Amy Sabrin, Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220 (1993).

the government's embassy.²⁰ The law, by its very terms, drew a distinction among speech based on the viewpoint expressed.

Subject matter neutral means that the government cannot regulate speech based on the topic of the speech.²¹ A case from two decades ago, *Carey v. Brown*, is illustrative.²² Chicago adopted an ordinance prohibiting all picketing in residential neighborhoods, except for labor picketing connected to a place of employment. The Supreme Court held this regulation unconstitutional. The Court explained that the law allowed speech if it was about the subject of labor, but not otherwise. The Court said that whenever the government attempts to regulate speech in public places, it must be subject matter neutral.²³

The provisions in the Model Code are both subject matter and viewpoint restrictions on speech. Candidates are allowed to speak about their qualifications, but are not allowed to speak about what they will do once on the bench. This, by definition, is regulating the topics that can be addressed and thus constitutes a subject matter restriction on speech. Moreover, as described above, candidates cannot express their views about issues likely to come before their courts. This too, by definition, is a viewpoint restriction on speech.

V. CONTENT-BASED RESTRICTIONS ON POLITICAL SPEECH MUST MEET STRICT SCRUTINY

The law, of course, is clear that content-based restrictions on speech must meet strict scrutiny.²⁴ Although there are categorical exceptions to this rule, such as for incitement and obscenity, political speech by judicial candidates does not fit into any such exemption. Quite the contrary, political speech has long been regarded at the very core of the First Amendment.²⁵ Alexander Meiklejohn wrote that freedom of speech "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."²⁶ He argued that "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."²⁷

There is little disagreement that political speech is at the core of that protected by the First Amendment. The Supreme Court has spoken of the ability to criticize government and government officers as "the central meaning of the

20. 485 U.S. 312 (1988).

21. See Sabrin, *supra* note 19, at 1218-19.

22. 447 U.S. 455 (1980).

23. *Id.* at 471.

24. See, e.g., *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., Inc.*, 502 U.S. 105 (1991).

25. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 752 (1997).

26. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

27. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

First Amendment.”²⁸ Thus, the restrictions on speech in the Model Code²⁹ can be upheld only if they are deemed to be necessary to achieve a compelling government interest.

Although I would imagine that Professor O’Neil agrees with this, it is notable that he does not expressly use the language of strict scrutiny or argue that it is met. He speaks of the “roster of valid and substantial interests which are potentially served by regulating judicial campaign speech.”³⁰ I believe, though, that Professor O’Neil would claim that the interests he identifies—particularly upholding due process—are sufficient to meet strict scrutiny.

VI. THE RESTRICTIONS ON POLITICAL SPEECH OF JUDICIAL CANDIDATES FAIL TO MEET STRICT SCRUTINY

This is the place where I think Professor O’Neil and I disagree. I do not believe that the interests he identifies are sufficient to meet strict scrutiny.

Before considering the specific rationales upon which Professor O’Neil relies, I disagree with one of his premises. Professor O’Neil writes that “public confidence in the judiciary and its integrity will remain a fragile commodity, not likely to be enhanced by public exposure to intemperate exchanges between contentious candidates for the bench.”³¹ Unlike Professor O’Neil, I do not think that public confidence in the courts is fragile; quite the contrary, it seems resilient and a product of over 200 years of American history.

At a time when other government institutions are often held in disrepute, the Supreme Court’s credibility is high. Professors John M. Scheb and William Lyons set out to measure and determine the extent of this high public opinion in a recent study.³² They conducted a survey to answer the question: “How do the American people regard the U.S. Supreme Court?”³³ Their conclusion is important:

According to the survey data, Americans collectively render a relatively positive assessment of the U.S. Supreme Court. Not surprisingly, the Court fares considerably better in public opinion than does Congress. The respondents are almost twice as likely to rate the Court’s performance as “good” or “excellent” as they are to give these ratings to Congress. By the same token, they are more than twice as likely to rate Congress’ performance as “poor.”³⁴

This survey was done in 1994, before the recent events that likely further

28. *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964).

29. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (2000).

30. O’Neil, *supra* note 3, at 715.

31. *Id.* at 714.

32. John M. Scheb II & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273 (1994).

33. *Id.* at 273.

34. *Id.* (footnotes omitted).

damaged Congress' public image.

Strikingly, Scheb and Lyons found that the "Court is fairly well-regarded across lines that usually divide Americans."³⁵ For example, there are no significant differences between how Democrats and Republicans rate the Court's performance. In short, the Court is a relatively highly regarded institution, more so certainly than Congress or the presidency.

This is not a new phenomenon. Throughout this century, the Court has handed down controversial rulings. Yet the Court has retained its legitimacy and its rulings have not been disregarded. Judge John J. Gibbons remarked that the "historical record suggests that far from being the fragile political institution that scholars like Professor Choper, and . . . Alexander Bickel, have perceived it to be, judicial review is in fact quite robust."³⁶

Indeed, the events of December 2000 make me very skeptical about claims concerning the credibility of the courts. The Supreme Court decided the 2000 presidential election in a decision that is likely regarded by the majority of Americans who voted for Al Gore as improper. Yet, there is no indication that the high Court's decision had a measurable effect on confidence in the Court. After *Bush v. Gore*,³⁷ I repeatedly was asked whether that decision would damage the Supreme Court's credibility. I said that the Court's institutional legitimacy was the product of 200 years of experience and it was unlikely to change based on one, or even several decisions.

I realize that these comments relate to the Supreme Court, and Professor O'Neil is discussing the state courts. Yet, I do not see the fragile state of credibility that Professor O'Neil asserts. And after *Bush v. Gore*,³⁸ I am skeptical of any concerns about judicial credibility. I am not sure why one would speak of a lack of judicial credibility, measure it, or assess whether it changes, or even why it matters. To the extent that this is a premise for Professor O'Neil's defense of the restrictions on judicial campaign speech, I strongly disagree with him.

Professor O'Neil's primary justification for restricting the speech of judicial candidates is ensuring due process.³⁹ He notes that most analysis of the issue focuses on "judicial integrity" or "public confidence in the judiciary."⁴⁰ He writes: "While these interests are hardly insubstantial, they do not adequately cover the field. . . . The core concern is nothing less than ensuring due process for litigants."⁴¹

Ensuring due process is certainly a compelling government interest. The key question, though, is whether regulating speech of judicial candidates is necessary

35. Scheb & Lyons, *supra* note 32, at 273-74.

36. John J. Gibbons, *Keynote Address, Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260, 270-71 (1981).

37. 531 U.S. 98 (2000).

38. *Id.*

39. O'Neil, *supra* note 3, at 715.

40. *Id.*

41. *Id.*

to ensure due process. Professor O'Neil, unfortunately, does not elaborate why this is so. Instead, he devotes most of the rest of his Paper to arguing that judges are different from other elected officials and therefore that judicial elections should be treated differently. Before considering this claim, it is essential to look carefully at the argument that restricting speech in judicial elections is necessary to ensure impartial judges and due process. Only if this is so can the restrictions meet strict scrutiny.

I, of course, do not dispute that impartial judges are a requirement of due process of law. My disagreement with Professor O'Neil is over whether judges who have expressed views should be regarded as impermissibly biased. Though Professor O'Neil apparently assumes this, he does not explain why it is so.

The argument must be that judges who have expressed views will not be open-minded on the bench; they will be likely to decide the issue as they have promised. This assumes that the judge will decide cases based on his or her prior speech rather than the facts and law of the case. I question this assumption. Judges take an oath of office, and their judicial role serves as an incredibly powerful influence over their behavior. The judicial role is to decide cases as impartially and fairly as possible. Indeed, I could imagine that judges who made a promise in their campaign might try to "bend over backwards" to show that they are fair and not simply following their prior speech.

Even if this is not so, the issue of impartiality is much more difficult than Professor O'Neil acknowledges. All judges come on to the bench with views about important issues, whether or not these have been expressed during the election campaign or the confirmation process. The key question is whether a judge is more likely to follow these views if they have been expressed. If the judge would do the same thing whether or not the views have been expressed, then the speech does not make the judge less impartial. The judge has exactly the same biases; the only difference is whether people know them in advance. Antonin Scalia would vote to overrule *Roe v. Wade*⁴² whether he expressed this in his confirmation hearings or not.

It is purely speculative whether the judge, having expressed views, is more likely to decide based on them than if the judge has the same views but had not voiced them. Perhaps the public commitment solidifies the views and causes a greater likelihood that they will be the basis for the decision, or, as suggested above, maybe the judicial role will be so powerful that the judge will decide the case strictly on its merits. Or he or she may reach a decision contrary to prior speech in an effort to show impartiality. Most likely the judge usually would do exactly the same thing whether or not there was a prior expression of the position.

If the judge is influenced by the likelihood of a future election, the prior speech is likely to have even less of an effect. A judge who is trying, consciously or unconsciously, to please the voters will take the politically popular approach, whether or not it was expressed previously. If the prior commitment remains politically popular, a judge would likely retain that stance in any event. If times

42. 410 U.S. 113 (1973).

have changed and political winds have shifted, a judge probably would abandon the prior position. Either way, the earlier speech itself makes little difference in the judge's behavior.

In other words, it is highly questionable whether expressing views makes judges less impartial or more likely to decide the case in a particular direction. The response to this could be that the difference is that expression of views makes the judge *appear* less impartial. However, while impartial judges are clearly a requirement of due process of law, it is more difficult to argue that the appearance of impartiality is a constitutional mandate.

More importantly, it is not at all clear as to what is enough to make a judge impermissibly appear to be biased. Does a judge lack impartiality if the judge has decided several similar cases in a particular direction and it is clear from them how a current case will be resolved? If the judge has written a judicial opinion expressing views on exactly the issue now pending, does that make the judge appear impermissibly partial? If the judge's ideology makes a result highly likely, does that violate the need for the appearance of impartiality? These situations occur all the time, and I never have heard anyone suggest that they violate due process. I cannot imagine a credible argument that it violates due process for Justice Scalia to sit on abortion cases, though it is absolutely clear as to how he will vote.

Indeed, the assumption must be that litigants will perceive the judge differently because of the statements in the election campaign. It is quite possible that other aspects of the judge's behavior—other cases decided, opinions written, overall ideology—would cause the litigants to perceive the judge in exactly the same way.

Finally and quite importantly, this argument assumes that knowing the views of a judge in advance is undesirable. My sense is the opposite: as an attorney or litigant, I would rather know where the judge stands on the issue in advance. As explained above, judges have views that often determine how they decide cases. As such, I think it is better to know judicial views than it is to pretend that judges are blank slates. From this perspective, judges expressing their views does not make them less impartial, it just makes their preexisting positions known. If anything, this helps litigants and advocates because they can deal with the judge as he or she exists, appealing to the views that are there, or trying to persuade the judge to change or modify them.

Professor O'Neil concludes his Paper by arguing that judges are different from legislative or executive candidates.⁴³ He emphasizes this point to distinguish *Brown v. Hartlage*,⁴⁴ which declared unconstitutional a state law that restricted the rights of candidates for elective office to make promises to voters and constituents. Professor O'Neil, of course, is correct that *Brown* did not involve judges.⁴⁵ But the question is whether the differences between judges and other elected officials are sufficient to distinguish the case.

43. O'Neil, *supra* note 3, at 720.

44. 456 U.S. 45 (1982).

45. O'Neil, *supra* note 3, at 714.

Unlike Professor O'Neil, I believe that *Brown* should be followed in the area of judicial elections. *Brown* says that restricting campaign speech strikes at the very core of the First Amendment.⁴⁶ *Brown* is only distinguishable if strict scrutiny is met in judicial elections, which I dispute above. Moreover, although judges are different from other elected officials in many ways, in other more crucial ways they are identical. Judges, like all elected officials, must make decisions and frequently have discretion in choosing. Judges, like all elected officials, come to their role with views that are likely to affect their decisions. Voters in judicial elections, like all elections, should evaluate candidates based on their views, as well as their professional qualifications, experience, and suitability for the role. All of these similarities justify treating the speech of judicial candidates like that of all other politicians.

This is not to suggest that speech is ever absolute or that there are no limits on what judges can say in election campaigns. The same First Amendment principles should apply to judges that apply to all other political candidates. For example, under defamation law, speech is not constitutionally protected if it is injurious to reputation, is false, and was uttered "with 'actual malice' . . . that is with knowledge that it was false or with reckless disregard" of the truth.⁴⁷

As Professor O'Neil points out, several lower courts have used this test. He objects to it because it is oriented to protecting reputation, not safeguarding the impartiality of courts.⁴⁸ As explained above, I disagree with his view that restricting speech is justified to ensure unbiased judges. The defamation standard is appropriate because it marks the well-established line between protected and unprotected political speech. It should be followed in judicial elections, as it is in all others.

CONCLUSION

The simple reality is that judicial elections make judges and judicial candidates politicians. As politicians, the First Amendment protects their right to express their views. Voters should be able to hear the views of judicial candidates in deciding how to cast their ballots. If this stance is objectionable, the solution should be to reconsider how we elect judges, rather than silencing their voices.

46. See 456 U.S. at 52-54.

47. *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964).

48. O'Neil, *supra* note 3, at 718.

THOUGHTS ON THE DEMOCRATIC BASIS FOR RESTRICTIONS ON JUDICIAL CAMPAIGN SPEECH

ROBERT F. BAUER*

INTRODUCTION

As I have read the fine papers prepared for the *Symposium on Judicial Campaign Conduct and the First Amendment*, I am struck by how closely the debate over judicial campaign regulation is shadowed, if not molded, by the longstanding argument over legislative campaign finance reform. The latter debate has run on for some time—run, some would say, into the ground—as familiar arguments are traded back and forth about the conflict between “speech” and controls of “corruption” in the regulation of the electoral process. Worse, the campaign finance reform debate is to some degree responsible for a regulatory arrangement which attracts little respect and, in some areas, spotty compliance, and which has not done much for public confidence in the electoral process.¹ The discussion of judicial campaign reform in some of the Symposium papers, not to mention in court decisions, appears to have been largely cast in the same terms; and it seems to assume the same policy choices between more or less regulation, and thus more or less speech. If that discussion is not fundamentally recast, with more attention paid to the particular requirements of judicial rather than legislative campaign regulation, it is likely to be unproductive.

For this reason, Professors BeVier and O’Neil emphasize that judicial candidates are different from candidates for other offices.² Drawing on the work of Professor Schotland, Professor O’Neil cites some of the fundamental differences between the missions of judges and legislators.³ For example, legislative candidates are expected to make specific commitments about their performance in office; judicial candidates are not. Likewise, legislative candidates must, to perform competently as politicians, show preference for friends and allies while in office, and in this way partiality. Conversely, impartiality is the highest calling of the jurist. Legislative candidates may meet

* Partner and Chairman of the Political Law Group, Perkins Coie. B.A., 1973, Harvard University; J.D., 1976, University of Virginia. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. It is telling that a sitting member of the Federal Election Commission recently published a book, carefully argued and well received, calling into question the constitutionality and overall viability of federal campaign finance regulation in its current form. BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (2001).

2. Lillian R. BeVier, *A Commentary on Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 845, 847 (2002); Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 715-18 (2002).

3. O’Neil, *supra* note 2, at 716-17.

with anyone at any time, publicly or privately, to hear their concerns about official matters, while judges are bound by *ex parte* rules and other norms to avoid informal exchanges with parties and others who have or may have business before them. Therefore, because candidates for judicial office are different kinds of candidates for a different kind of office, the analysis of the affected rights—of the candidate, parties or the public—should be different. With these distinctions in mind, Professor BeVier correctly advances the proposition that “the scope and extent of [judicial candidates’] First Amendment rights . . . ought not in the first instance to be measured by the same yardstick that applies to candidates for legislative or executive office.”⁴

I. JUDICIAL POLITICS AND DEMOCRATIC VALUES

Professor BeVier’s argument can be taken further still, by examining the implications of judicial campaigning for democratic theory and practice in our time, especially when the courts’ role in fashioning social policy has greatly expanded. For a number of reasons, Americans seeking to influence policy turn to the courts at the same time as our “representative” institutions—the legislative and executive branches—suffer from a loss of public confidence, paralyzing interparty and ideological conflict, and the effects of persistent voter apathy. The range of issues courts are called upon to address are almost as broad as the national legislative or political agenda, and include gun control, reproductive rights, affirmative action, regulation of the tobacco industry, and the election of a President.⁵ It is fair to say that interest groups furiously spending for one judicial candidate over another are not concerned with influencing the decisions made in routine disputes between neighbors over property lines. As Professor Briffault astutely observes, the present controversy over judicial campaign finance—over concerns such as rising costs and crude campaign tactics—is “a backhanded tribute to the power and discretion of state judges and to the high political stakes in many state judicial elections.”⁶

On the face of it, directing attention to the powerful role of the courts might seem to support Professor Gillers’ suggestion that voters must make informed choices about powerful officials—in this instance, judges—and that judges must be allowed to present their case as candidates to the voters.⁷ Yet I would argue that pervasive judicial power cuts altogether the other way. To the extent that the courts are drawn ever more centrally into core political and social disputes, it will

4. BeVier, *supra* note 2, at 847.

5. See e.g., Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1078 (1996) (citing range of issues eliciting judicial candidate comment, including consumer rights, abortion and school prayer).

6. Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002).

7. Stephen Gillers, “If Elected, I Promise [_____]”—What Should Judicial Candidates Be Allowed to Say?, 35 IND. L. REV. 725 (2002).

be important to preserve their integrity and their function as “courts” and assure that in all possible ways judges are encouraged to act, reason, and decide their cases as *judges*, and that voters are encouraged to see and evaluate them as such.

Chief Justice Shepard of the Indiana Supreme Court has demonstrated how the due process rights of individual litigants are compromised by the campaign pledges of judicial candidates. He is rightly concerned with the effect of judicial candidates’ “particular statements” on “individual cases” in the future.⁸ The Chief Justice’s perspective is powerful; and I propose to add another dimension to it, by looking beyond the courtroom to consider the harm that judicial campaigning might do to the democratic process as a whole, impacting all citizens. An exclusive concern with First Amendment doctrine, imported from the inapposite context of legislative campaign reform, tends to conceal this harm from view.⁹

II. THE JUDGE-POLITICIAN DIVIDE

The harm addressed here lies essentially in allowing a view of the judge, and allowing the judge to view herself, as little different from the politician-legislator. In this view the judge-as-politician makes commitments, fashions alliances, and in effect bargains with competing interests just as elected representatives must do. But there is a crucial difference: the judge, once elected, operates in splendid isolation from the day-to-day democratic pressures experienced by legislators. For example, a judge is isolated from any informal contact or meeting on court matters with an affected party. Judges do not hold press conferences, or answer constituent mail. They cannot take steps outside the evidence presented and the pleadings submitted to gather, on their own initiative, facts relevant to the case before them. Once a case is submitted, the opinion they issue is the sole explanation required for their significant decisions on process and substance. However, they may make important but less visible decisions—in dealings with counsel, or rulings on objections, or the schedule they set for trial—that are not, or not often, explained publicly, but have enormous impact on the outcome of any given case.

Thus, judges and politicians exercise their powers—and answer for that exercise—in fundamentally different ways. As courts are thrust into the center

8. Shepard, *supra* note 5, at 1090-91.

9. Professor BeVier seems to make a similar point about the inapposite application of the First Amendment to judicial campaigns. Her attention, however, is more sharply focused on the “due process” harms to litigants and the damage generally to the “rule of law” if judges are free to make political commitments that override their responsibility to “apply” the law. BeVier, *supra* note 2, at 849. As I note below, we have ceded to judges, in some instances openly and with purported theoretical justification, broad authority to “make law,” and we must therefore consider with care the impact on democratic values of also allowing them to function, in their roles as candidates, like politicians. In light of the powerful role of the courts, the more judges act like politicians (and the less they act like judges), the greater the danger to the democratic process as a whole.

of our major social and political controversies, respecting and preserving that difference is of pressing importance to democratic life. We are willing to confer on judges remarkable powers we would never willingly cede to politicians, and we accord to judges a respect and consideration for their authority that politicians can only dream of. Right or wrongly, as Jeremy Waldron has remarked, “the processes by which courts reach their decisions are supposed to be special and distinctive, not directly political, but expressive of some underlying spirit of legality.”¹⁰ Waldron believes we are wrong to suppose this, while others would say we are right to do so; but the supposition is widespread, as evidenced by the high standing of the judiciary, broad acceptance of the authority of its decisions on highly contested questions of basic rights, and the theoretical work done in academe to justify this state of affairs.

Yet by encouraging judges to act and to be viewed as “candidates” on the representative model, and thereby encouraging or allowing them to campaign with promises and commitments of one kind or another, we obliterate the line between the judge and the legislator-politician. This is frequently justified by two related arguments, both erroneous.

The first argument is made in the name and under the authority of the constitutional importance of “speech” to the judicial candidate and to the voter. As Professor Gillers sees it, voters cannot be offered elections and yet denied the information required to make their choice among candidates.¹¹ The “speech” in question, however, is as much political activity as it is informative communication. Rather than simply embodying “information,” campaign speech, more than other political speech, is instrumental in character, molded tactically to accomplish political goals, such as building or sustaining a voting majority, through careful signaling or nuance, or by outright commitment. There is a reason why politicians employ speechwriters and prepare with agonizing care for debates and public appearances: political speech has broad political consequences beyond whatever “information” it conveys. It works a subtle but significant effect on the role of the judicial candidate and his or her relationship to the voter.¹² Judges who campaign like politicians become, in effect, politicians; their relationship to the audience is transformed into a political relationship.

The second error lies in viewing all elections the same, regardless of the character of the offices to be filled, or the responsibilities to be assumed. By this view, an election to the judiciary is like one to the legislature, and so it cannot be fairly or responsibly conducted without robust and uninhibited candidate “speech.” Experience belies this view, however. In many organizations, such as law firms or trade associations, active campaigning for leadership positions is

10. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 24-25 (1999).

11. Gillers, *supra* note 7.

12. Professor Schotland correctly warns that as the nature of judicial elections change, “we do not yet know how much the rise [in competition] will change the kinds of people who seek to serve—and stay—on the bench.” Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 859.

considered inappropriate. Candidates are evaluated on the basis of *who they are*, not what they *say*. One sees this approach in associations, for example, that employ nominating committees to discuss potential candidates and then assemble proposed “slates” for election to particular offices. There is no procedure for “campaigning” by the candidates, no information demanded from them about their plans, promises and commitments; and yet the members of these associations still generally regard their governance as “democratic” in character. “Politics” is not the same everywhere, and for all purposes. Hence, a judicial election remains significant, even if it is not conducted on the same model as a legislative election.¹³

III. SOME DEFENSES OF JUDICIAL POLITICS—AND A REPLY

Those urging open, unfettered judicial campaign speech would likely respond in part that if courts are to wield vast powers on those major political and social issues, some measure of political accountability is urgently needed. The judiciary, it would be claimed, cannot have it both ways—to intervene actively on major issues while retreating to chambers, in their robes, to elude accountability. The point, however, is that it is only tolerable (if to some, it is tolerable at all) that courts wield vast influence over these issues if we assure the public *the courts will address such issues as courts, striving to act only as courts*. Legal theorists like Ronald Dworkin have argued, for example, that judges must make political decisions, provided that, as Dworkin would have it, they are decisions based on “political principles” concerned with enforcing basic moral rights between citizens and against the state.¹⁴ This sweeping formulation has a wide following, in academe and the general public, but from the point of view of democratic practice, a critical distinction must at the least be maintained between

13. Another example is the politics of colonial America. As Joanne Freeman has recently argued, the politicians of the early Republic were preoccupied with the establishment and defense of personal honor and reputation, and with offering leadership based on their personal and social standing. JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2001). Freeman notes that these concerns gave rise to a “fundamental contradiction of republican politics,” namely, “[w]hen both personal reputations and political careers rested on popular approval, what was the distinction between public-minded lawmaking and demagoguery?” *Id.* at 37. Colonial politicians were anxious to advance their political careers while the at the same time avoiding charges, then deemed damaging, of “begging of Votes” or being a “people-pleaser.” *Id.* The authors of the Federalist Papers evidenced a still more formal concern with selecting a President from “characters pre-eminent for ability and virtue,” and not those with a talent for “the little arts of popularity”; and on this basis, they defended the role they chose for the Electoral College. *THE FEDERALIST* NO. 68, at 395 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Of course, as the nature of politics in this country changed, these assumptions—and the structure reflecting them—also changed. The point here is that not all elections, or the requirements for their conduct, can be the same, but rather must conform to the perceived nature of the offices and the qualifications of those proposing to occupy them.

14. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11 (1985).

decision making on “political” principles, on the one hand, and a politicized decision-making process on the other.¹⁵ The basic judicial role and function must remain nonpolitical, even if particular decisions have broad political effects.

Whatever the view taken of the breadth of responsibility courts assume, we should want judges to exercise this responsibility with the tools of their trade—impartiality, respect for the law, and the application of careful constitutional and legal analysis. Otherwise, their decisions would be more appropriately committed to the legislatures and full-throated popular politics. Nor is the problem of accountability achieved within the framework of democratic practice by the requirement of seeking reelection, when it is beyond dispute that judicial elections favor incumbents who benefit from limited voter interest and low visibility.¹⁶

One more objection commonly lodged against broad speech restrictions is fairly noted. This argument holds that if “independent” groups, protected by the First Amendment, freely attack candidates, the candidates should be free to respond.¹⁷ There is considerable intuitive power to this position, but it is undermined by a key faulty assumption and minimizes the potential efficacy of nonregulatory solutions that could mitigate perceived inequities.

The questionable assumption is that a regulatory structure is discredited if it is deficient in notable respects—if it has gaps, even large ones. In fact, in this area of regulation, like others, the goal must be to do what can be done. For example, much of the frustration over federal campaign finance laws reflects unrealistic expectations, a tendency (even a compulsion) to belittle its accomplishments and exaggerate its failures.¹⁸ Government regulation is always

15. This point does not only apply to theorists of the “liberal” stripe like Dworkin. Richard Posner, who does not share Dworkin’s political views, claims for “pragmatic” judges the broad duty to look, in making their decisions, beyond “authorities” such as statutes, precedent and constitutional text, which he describes as “sources of information” imposing “limited constraints on his [the judge’s] freedom of decision.” He would like judges to be concerned broadly with facts and consequences, and thus prepared to make disciplined but flexible use of the “methods of social science and common sense.” RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 242, viii (1999). In other words, Posner’s judges, like Dworkin’s, are powerful, though for different reasons.

16. See Shanto Iyengar, *The Effects of Media-Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections*, 35 IND. L. REV. 691 (2002). For data showing that from 1980 to 1995, almost half of incumbent justices were not challenged, see Schotland, *supra* note 12, at 853-54.

17. There is, of course, a lively debate over whether the Constitution would tolerate some compelled disclosure of these groups’ sources of financing. Jan Witold Baran, *Compelled Disclosure of Independent Political Speech and Constitutional Limitations*, 35 IND. L. REV. 769 (2002); Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755 (2002).

18. For example, the Federal Election Campaign Act has accomplished the most comprehensive, actively enforced disclosure regime in American history, but its relative success in this area is so well accepted that it is barely noticed anymore.

an imperfect undertaking, all the more so where political interests and constitutional concerns are acute. We may need to live with imperfect rules, ones that seem to work some measure of unfairness on judges eager to answer their critics, but imperfect rules are preferable to completely inadequate rules or none at all.

Moreover, judicial elections present an opportunity—and also an urgent need—for organized, effective citizen action to take the place of formal regulation, and to do so with some measure of success. The various jurisdictions experimenting with judicial campaign oversight committees follow varying approaches with apparently different results, but some have shown considerable promise.¹⁹ With time, education, and experience, communities, including their press, may well prove more responsive to this type of collaborative action of citizens and the bar than would have been thought possible—and certainly than would be possible in the area of legislative campaigns. And the reason may be no more and no less than the fundamental, widely shared conviction that judicial elections *are* different.²⁰

CONCLUSION

It is a common mistake, so it is said, to wage the present war with the weapons and strategy suitable to the last one. The mistake addressed in this Paper is that of confusing judicial with legislative candidates, and thus employing the same constitutional line of argument familiar from the now stale debate over legislative campaign finance to determine (and thus limit) restrictions on judicial campaign speech. A particular and serious consequence of this mistake is the failure to consider the adverse effect on democratic practice if judicial campaigns are waged like all others. Those affected by a refusal to see the key distinction between judge and politician, and by a refusal to insist that judges act as their social and political role requires, include litigants, to be sure—but also, all of us.

19. Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002). For example, in Alabama in 1998, an active committee drew strong editorial praise for encouraging a markedly “nicer” and “cleaner” election. *Id.* at 788-89.

20. It is not, for example, inconceivable that in some states, these committees could pressure broadcast stations into declining to accept independent group advertising. Federal law does not compel stations to accept this kind of editorial advertising, and they are free to adopt blanket policies refusing them in the public interest. In fact, stations have sometimes refused ads in nonjudicial races, and there is a reason to believe that they would more favorably entertain requests to do so in judicial races than in others.

CONSTITUTIONAL ISSUES IN DISCLOSURE OF INTEREST GROUP ACTIVITIES

DEBORAH GOLDBERG*
MARK KOZLOWSKI**

INTRODUCTION

The *Call To Action* issued by participants in the December 2000 *Summit on Improving Judicial Selection* declares that “[s]ome activities of special interest groups in recent judicial elections . . . have been pernicious” and recommends consideration of “creative ways, consistent with the right of free speech, in which state rules as to . . . financial disclosure can be applied to outside groups and individuals as well as candidates and political parties.”¹ This Paper answers that call by examining the extent to which states may compel reporting of information from groups that independently undertake political activities designed to influence judicial elections.²

In 2000, interest group involvement in judicial elections reached a new high—and a new low.³ The “pernicious” activities that troubled Summit participants were television advertising campaigns conducted principally (although by no means exclusively) by the U.S. Chamber of Commerce (“Chamber”) and its affiliated state organizations. Experts estimate that entities other than candidates (including political parties) spent upwards of \$16 million in just the five states with the most expensive elections: Alabama, Illinois, Michigan, Mississippi, and Ohio.⁴ The advertising resulted in judicial campaigns

* Deputy Director, Democracy Program, Brennan Center for Justice at NYU School of Law. B.A., 1976, Washington University, St. Louis, Missouri; Ph.D., 1980, The Johns Hopkins University; J.D., 1986, Harvard Law School. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the authors and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

** Associate Counsel, Brennan Center for Justice at NYU School of Law. B.A., 1980, Sarah Lawrence College; Ph.D., 1989, Columbia University; J.D., 1991, Harvard Law School.

1. *Call To Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1359 (2001).

2. Spending on activities that are coordinated with a candidate is typically treated as a campaign contribution, which may be limited in source and amount and may be subject to reporting requirements. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 475 (2001) (reaffirming the functional equivalence of coordinated spending and a contribution); *Buckley v. Valeo*, 424 U.S. 1, 23-59 (1976) (per curiam) (upholding regulation of contributions, defined to include coordinated expenditures).

3. In this Paper, the term “interest group” refers to an entity other than a candidate, a political action committee, or a political party committee.

4. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 862 n.54.

that have been variously described as “nasty,”⁵ “covered in muck,”⁶ and “pandering to base, ignorant prejudices.”⁷

The negative tone of advertising is beyond the reach of regulatory control, and states may not (while the Supreme Court’s decision in *Buckley v. Valeo*⁸ is still good law) cap independent electoral expenditures. *Buckley* has been interpreted to foreclose mandatory monetary limits on spending in an election, including judicial elections.⁹ Moreover, attempts to bar “attack ads” would appear to be classic content restrictions violative of the First Amendment, irrespective of the identity of the sponsor. Unless public outrage causes objectionable interest group ads to backfire—whether against the judicial candidate supported by the group or against the group and its backers—we can therefore almost certainly expect more of the same in elections to come.¹⁰

5. See Curt Guyette, *Justice at Any Price?*, DETROIT METRO TIMES, Oct. 10, 2000, available at <http://www.metrotimes.com/editorial/story.asp?id=725>.

6. Joe Hallett, *Supreme Court Race Features Outsider Mud*, COLUMBUS DISPATCH (Ohio), June 11, 2000, at 3B.

7. Robert Loeb, Letter to the Editor, *Political Excess a Natural Outcome When Judges Are Elected*, CHI. DAILY L. BULL., Apr. 4, 2000, at 2. For more about the character of advertising, see Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669 (2002).

8. 424 U.S. 1 (1976) (per curiam).

9. See *id.* at 39-59 (invalidating mandatory spending limits in federal elections, including caps on independent expenditures); *cf.* *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (invalidating mandatory spending limits applicable to Ohio judicial candidates). The Supreme Court has also refused to carve an exception to this rule for spending by political action committees (“PACs”). See *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 494-95 (1985) (finding full First Amendment protection for such spending, even though PAC donors have no say in how their funds are used). Moreover, states that want interest group donors to act as a brake on pernicious activity may face constitutional obstacles if they seek to achieve that end by mandating adoption of more democratic internal PAC procedures.

For two reasons, states are also unlikely to restrain skyrocketing spending by imposing limits on contributions to PACs. First, although such limits are constitutional, see *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 201 (1981), the evidence suggests that they are an ineffective means of restraining spending. See, e.g., FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 158-59 (1992). Candidates operating under contribution limits have been able to raise (and spend) at least as much money as they did before the imposition of caps, by seeking smaller donations from more sources. There are good reasons to promote such small donor fundraising, but reducing overall expenditures is not one of them. Second, even if contribution limits were effective for that purpose, interest groups that do not conduct their activities through PACs involved in judicial campaigns are generally not PACs. Contributions to the interest groups have not been, and perhaps cannot be, limited. Whether or not such groups can be required to form PACs to conduct their advertising campaigns is one of the tricky constitutional issues of first impression raised by the current version of the McCain-Feingold bill. See generally *McCain-Feingold-Cochran Campaign Reform Bill*, S. 27, 107th Cong. (2001).

10. The Chamber has in fact declared that it intends to conduct similar activities during future judicial elections. See Katherine Rizzo, *Chamber Ads Failed in Ohio, Worked Elsewhere*, AP

That pressure can be exerted, however, only if the public is informed about the interests behind the ads. To date that information has not been readily available. When the advertiser is the Chamber, the interest served by the ad is reasonably clear. But often the sponsor nominally identified on the air is an entity created only for the campaign, with an innocuous-sounding name like "Citizens for a Strong Ohio" or "Citizens for an Independent Court."¹¹

Moreover, interest groups involved in judicial elections have refused to reveal who has contributed to their advertising campaigns, the amounts contributed, or the precise sums expended on the advertisements.¹² Even when the general interest of the sponsor is evident, that additional information may be important. Major donors might be willing to bankroll nasty advertising campaigns as long as their involvement can be concealed, but they may be reluctant to explain their role to shareholders, customers, or other members of the public. In judicial elections, as elsewhere, sunshine is sometimes the best disinfectant.¹³

The question therefore remains whether states may compel interest groups to release information about their contributors and spending in judicial elections, without running afoul of the First Amendment. We argue that such requirements are constitutionally permissible.

NEWSWIRE, Nov. 8, 2000. The Chamber announced at a conference in April 2001 that twelve of its fifteen endorsed candidates won election in 2000. The extent to which its advertising was responsible for that success rate is certainly open to question, but the success is undoubtedly now serving to justify additional campaign involvement. As of August 2001, we already began to see evidence of the Chamber's involvement in the 2001 Pennsylvania Supreme Court election. See Josh Goldstein & Chris Mondics, *An Effort to Sway Pa. Court Election*, THE INQUIRER, Aug. 12, 2001, available at http://inq.philly.com/content/inquirer/2001/08/12/front_page/JUDGES12/htm?template=aprin.

11. Stations broadcasting paid advertising are required to identify the ad's sponsor. See 47 U.S.C. § 317(a) (1994 & Supp. V 1999); 47 C.F.R. § 73.1212 (2001). Some states also impose sponsorship identification requirements for political advertisements. The law governing such requirements is discussed below. See discussion *infra* Part IV.

12. In both Mississippi and Ohio, the Chamber filed preemptive actions for judgments declaring the inapplicability of the states' disclosure laws. A decision imposing Mississippi's reporting requirements on the Chamber, see *Chamber of Commerce v. Moore*, No. 3:00-cv-778WS, slip op., at 27 (S.D. Miss. Nov. 2, 2000), is now *sub judice* before the Fifth Circuit. See No. 00-60779 (5th Cir. Nov. 6, 2001); *infra* notes 41-50 and accompanying text. In Ohio, the litigation was stayed pending the determination of an administrative complaint about the failure to disclose. See Order, *Chamber of Commerce v. Ohio Elections Comm'n*, No. C2-01-0028 (S.D. Ohio Mar. 5, 2001). When the Ohio Elections Commission finally decided that the Chamber's ads were beyond its jurisdiction, the complainant (and intervenor in the litigation) petitioned to reactivate the case. The motion awaits decision.

13. We are indebted to Roy Schotland for pointing out the applicability of Justice Brandeis' famous point.

I. THE LAW OF CAMPAIGN FINANCE REPORTING¹⁴

As is usually the case with matters of campaign finance regulation, analysis of the question presented here begins with *Buckley*.¹⁵ In reviewing the 1974 amendments to the Federal Election Campaign Act ("FECA"), the *Buckley* Court specifically considered whether the First Amendment permits the government to compel reporting of information concerning campaign contributions and expenditures.¹⁶ The Court analyzed reporting requirements applicable first to candidates (and political committees) and then to interest groups (and individuals).

With respect to reporting by candidates and committees, the Court began by acknowledging that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."¹⁷ But even under the exacting scrutiny required when government regulation significantly encroaches on constitutional rights, the Court recognized three government interests sufficient to outweigh the burdens:

First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely. . . . The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive¹⁸

Second, reporting requirements serve to combat the reality and appearance of corruption by exposing large contributions and expenditures to the light of day.¹⁹ Finally, the reports can provide data that is essential in enforcing limits on contributions.²⁰ Finding that disclosure was the least restrictive means to achieve these ends, the Court held that candidates and committees could be required to file periodic reports disclosing their finances.²¹

The constitutional analysis is different, however, when the Court considers reporting requirements governing organizations that run electioneering ads *independently* from any particular candidate. Because there is no transfer of

14. In this Paper, the term "reporting" refers to the process of filing campaign finance disclosure statements with a public agency responsible for collecting the statements and making them available for public inspection. "Reporting" must be distinguished from other forms of disclosure, such as the identification of a sponsor on the face of an ad or during the course of a broadcast. Sponsor identification is discussed below. See discussion *infra* Part IV.

15. 424 U.S. 1 (1976) (per curiam).

16. *Id.* at 11.

17. *Id.* at 64.

18. *Id.* at 66-67 (quotations and notes omitted).

19. *Id.* at 67.

20. *Id.* at 67-68.

21. *Id.* at 80-82.

money directly to a candidate, the *Buckley* Court found unpersuasive the anti-corruption rationale for disclosure.²² The Court nevertheless upheld reporting requirements for independent expenditures as a minimally restrictive means of furthering the government's *informational* interest: "help[ing] voters to define more of the candidates' constituencies."²³

The question of whether interest groups can be required to report contributions and expenditures for electioneering is therefore easily answered in the affirmative under the rubric of *Buckley*.²⁴ It is not so simple, unfortunately, to identify precisely what counts as the electioneering subject to such regulation. It is this definitional dispute that underlies the current controversy about interest group advertising campaigns, including those in judicial elections.

II. THE DISTINCTION BETWEEN "EXPRESS ADVOCACY" AND "ISSUE ADVOCACY"

Under *Buckley*, all spending by candidates and political committees can be presumed to be electioneering governed by reporting requirements.²⁵ Interest groups that are not political committees are another matter. Such groups might engage in electioneering and therefore be subject to regulation, but they might also be involved "purely in issue discussion" and thus fall outside the scope of mandatory campaign finance reporting.²⁶

To ensure that FECA's reporting requirements for interest groups were constitutionally applied, *Buckley* narrowly construed the statutory language to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."²⁷ According to the Court, that interpretation ensured that the regulations would apply only to "spending that is unambiguously related to the campaign of a particular federal candidate."²⁸ Unambiguous electioneering communications contained "express words of

22. *Id.* at 80.

23. *Id.* at 81.

24. Despite its holding in *Buckley*, the Supreme Court has upheld the right of an individual to distribute anonymous leaflets in a ballot referendum. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). However, *McIntyre* did not address reporting requirements, and as we argue below, its holding does not apply to interest groups engaged in television advertising campaigns for or against candidates. *See infra* notes 51-57 and accompanying text. The constitutionality of reporting requirements for contributions as low as \$100 is firmly established in *Buckley*, and even first-dollar disclosure requirements may be sustained if they are evenhandedly applied to individuals and groups. *See, e.g., Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 33 (1st Cir. 1993).

25. *See* 424 U.S. at 79 (construing a "political committee" as an organization the major purpose of which is the nomination or election of a candidate). Political committees under federal law include both interest group PACs and political parties, although special rules apply to political parties.

26. *Id.* at 79.

27. *Id.* at 80.

28. *Id.*

advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"²⁹

The narrowing construction, which created what has come to be known as the "magic words" test for "express advocacy," saved FECA's reporting requirement from constitutional infirmity. As so interpreted, the requirement was neither "void for vagueness" (insufficiently explicit about the range of expenditures that would be subject to regulation) nor substantially "overbroad" (applicable to political speech that does not contain an electioneering element).³⁰

With the narrowing construction came a new set of problems. Indeed, even the *Buckley* Court recognized: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign."³¹ A quarter of a century after *Buckley*, interest groups seeking to benefit a candidate's campaign while concealing their backers' identity run advertisements that avoid using "magic words" and claim that they are engaged in "issue advocacy." All but 1.2% of the television ads run by interest groups in the 2000 judicial campaigns fell into that category.³²

Since *Buckley*, the Supreme Court has only once provided further elaboration of the distinction between express advocacy and issue advocacy. In the 1986 case of *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL"),³³ the Court determined that a "Special Edition" of the respondent group's newsletter, which was distributed in advance of the 1978 elections, constituted express advocacy.³⁴ Among other things, the newsletter carried the title "Everything You Need to Know to Vote Pro-Life," encouraged readers to "vote pro-life," and indicated whether each of some 400 candidates held positions consistent with those of MCFL.³⁵ The Court concluded:

The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy.³⁶

In other words, in determining whether the interest group had made electioneering expenditures, the Court did not ask only whether the publication used "magic words" explicitly endorsing or opposing a particular candidate.

29. *Id.* at 44 n.52.

30. *Id.* at 40-44, 77-80.

31. *Id.* at 45.

32. See DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 18 (2002).

33. 479 U.S. 238 (1986).

34. *Id.* at 251.

35. *Id.* at 243-44.

36. *Id.* at 249.

Instead, a communication that “in effect” and in “its essential nature” conveyed an explicit directive was deemed sufficient to subject the group to regulation.

Whether “express advocacy” requires the presence of “magic words” is now a hotly contested issue. Courts across the country are split on the issue: most courts have adopted the magic words test, but the Ninth Circuit and several other federal and state courts have upheld more context-sensitive tests for express advocacy.³⁷ Thus, the extent to which states can regulate advertising lacking magic words depends in part on the jurisdiction in which the elections are conducted.³⁸

III. INTEREST GROUP ADVERTISING IN JUDICIAL ELECTIONS

Only two courts have addressed the meaning of express advocacy specifically in the context of judicial elections. In *Osterberg v. Peca*, the Texas Supreme Court did not need to resolve the controversy about “magic words,” because the advertisement in question (like the “Special Edition” in *MCFL*) used the word “vote.”³⁹ But the court (following the majority in *MCFL*) nevertheless

37. Compare, e.g., *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (granting preliminary injunction against definition of “express advocacy” in state law that went beyond magic words); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1061-64 (4th Cir. 1997) (invalidating federal regulation defining express advocacy to include more than magic words); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996) (per curiam) (same), with *FEC v. Furgatch*, 807 F.2d 857, 864-65 (9th Cir. 1987) (finding express advocacy even without magic words); *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10-11 (Or. Ct. App. 1999) (using *Furgatch* as the basis of a contextual definition of “expenditures” subject to Oregon’s reporting requirements), review denied, 994 P.2d 132 (Or. 2000); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 4 P.3d 808, 824 (Wash. 2000) (recognizing that an ad without magic words nevertheless was “unmistakable and unambiguous in its meaning, and present[ed] a clear plea for the listener to take action to defeat [the] candidate”); *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 733 (Wis.) (observing that *Furgatch* provided “an attractive alternative” to the magic words approach), cert. denied, 528 U.S. 969 (1999).

38. Connecticut and Oregon currently regulate such advertising. In addition, Mississippi’s law has been construed to require disclosure of the Chamber’s judicial campaign ads. See *supra* notes 41-50 and accompanying text. Connecticut’s law has not been challenged, and Oregon’s was upheld in *Crumpton*, 982 P.2d at 10-11.

39. 12 S.W.3d 31, 35-36, 52 (Tex. 2000). In pertinent part, the ad’s two screens ran as follows:

CONSIDER THIS:

Judge Peca was chosen by his peers El Paso’s outstanding jurist

He graduated Summa Cum Laude.

He worked to reduce his docket for over seven years.

IF THAT’S ENOUGH, VOTE FOR HIM

But, if you want ONE who understands:

The Courthouse exists for the people

The spirit of the law . . . must be employed for justice

examined the communication “as a whole and in context” before holding that the ad constituted express advocacy.⁴⁰ In *Chamber of Commerce v. Moore*, the Southern District of Mississippi went a step farther by explicitly rejecting the magic words standard in favor of a comprehensive contextual analysis of the ad’s “essential nature.”⁴¹

Chamber of Commerce v. Moore involved an estimated \$958,000 worth of television advertising broadcast during the 2000 campaigns for the Mississippi Supreme Court.⁴² The Chamber’s ads spoke in approving terms of four of the nine candidates, but did not use magic words to endorse their election. For example, an ad concerning incumbent Chief Justice Lenore Prather touted her thirty-five years of legal experience and contained the following encomium: “Lenore Prather—using common sense principles to uphold the law; Lenore Prather—putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests.”⁴³

The Chamber did not report its ads as “independent expenditures,” a term defined under Mississippi law as “an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate.”⁴⁴ According to the Chamber, the ads were exempt from the state’s reporting requirements because they did not contain any of the canonical terms of express advocacy. To head off potential efforts to regulate the advertising, the Chamber went to federal court seeking a declaratory judgment that compelled reporting would violate the First Amendment.

The district court refused, however, to determine the scope of express advocacy in accordance with “the rigid, overly simplistic ‘magic words’ test of

Efficiency at the expense of justice cannot be tolerated.

BRING THE COURTHOUSE BACK TO THE PEOPLE!

VOTE FOR HIS OPPONENT.

Id. at 35-36.

40. *Id.* at 52. Neither the concurring nor the dissenting opinion took issue with the majority’s interpretation of express advocacy. The majority noted that “a message can be ‘marginally less direct’ than the examples listed in *Buckley* so long as its essential nature ‘goes beyond issue discussion to express electoral advocacy.’” *Id.* (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986)). The court found that the second screen rendered the communication “unmistakable and unambiguous, suggestive of only one plausible meaning,” and that the ad’s contradictory pleas did “not diminish its essential express advocacy nature.” *Id.* at 53 (quoting *Furgatch*, 807 F.2d at 864).

41. No. 3:00-cv-778WS, slip op. at 25-27 (S.D. Miss. Nov. 2, 2000) (appeal pending).

42. The Mississippi Secretary of State arrived at this estimate after surveying television stations. Schotland, *supra* note 4, at 877 & n.137. Before the survey was completed, the press estimated the cost at only \$400,000. See *Shakeup on Miss. Supreme Court Called “Unprecedented,”* CLARION-LEDGER (Miss.), Nov. 8, 2000, available at <http://www.clarionledger.com/news/0011/08/08supremeanal.html>. The enormous disparity highlights the difficulty involved in tracking interest group spending without formal reporting requirements.

43. *Moore*, No. 3:00-cv-778WS, slip. op. at 6-7.

44. MISS. CODE ANN. § 23-15-801(j) (1999).

Buckley.⁴⁵ Rather, the court found that *MCFL* “moved away from a rigid, talismanic application of *Buckley*’s [magic words test] to an ‘essential nature’ inquiry.”⁴⁶ Pursuant to this standard, the court conducted the following analysis of the Chamber’s ads:

Aired at the very time statewide judicial elections were being conducted in Mississippi, the advertisements contain no true discussion of issues. While the advertisements mention “victims rights” and a “common sense judicial philosophy,” the advertisements present no elaboration of these points. Instead, while providing only the background and experience of each candidate, the advertisements repeatedly insert the candidates’ names between qualification assertions and each advertisement concludes with an emphatic phrase obviously designed to exhort support for the candidates’ election to the Mississippi Supreme Court.⁴⁷

The court also noted that “these advertisements are virtually the same as the advertisements being aired by the candidates themselves.”⁴⁸ Concluding that the ads “simply cannot be regarded as mere discussions of public issues,” the court denied the Chamber’s request for a declaratory judgment.⁴⁹ The district court’s decision has now been appealed to the Fifth Circuit and remains *sub judice*.⁵⁰

IV. THE LAW OF SPONSOR IDENTIFICATION

Related to the issue of the applicability of reporting regulations to political communications made by independent groups is the question of whether such groups may be required to disclose their financial sponsors in the

45. *Moore*, No. 3:00-cv-778WS, slip op. at 25.

46. *Id.* at 25.

47. *Id.*

48. *Id.* at 26.

49. *Id.* at 25, 27. In the few days remaining between the issuance of the decision and Election Day, furious battles ensued over enforcement of the district court decision requiring disclosure and two collateral state court orders enjoining broadcasts of the ads. The complex details of that litigation are not relevant here, except to note that an appeal from the state court decisions is now pending in the Mississippi Supreme Court, *Chamber of Commerce v. Landrum*, No. 2000-CA-2048, *case submitted without oral argument* (Miss. Nov. 6, 2001).

50. The district court opinion has had an impact in Ohio, where the Chamber also ran advertisements during the 2000 judicial elections. Before that opinion was issued, the Ohio Elections Commission had denied, by one-vote margins, petitions filed by advocacy organizations asking the Commission to declare that the Chamber’s advertisements constituted express advocacy. On the day before Election Day, however, a panel of the Commission, again by a one-vote margin, found probable cause to submit the question to the full Commission. The Commissioner, who switched his vote in favor of referral, stated that the Mississippi district court opinion had persuaded him to change his view. In April, however, the full Commission voted 4-3 in favor of dismissing the case, a decision that advocacy organizations have appealed in state court, where the matter remains pending.

communications themselves. The only case in which the U.S. Supreme Court has squarely addressed this question is *McIntyre v. Ohio Elections Commission*.⁵¹

In *McIntyre*, the Court held that Ohio's flat ban on the distribution of anonymous campaign literature violated the First Amendment.⁵² The Court's decision rested largely on the identity of the party who had been prosecuted, a lone citizen pamphleteer in a local referendum election. In such a case, said the Court, mandatory disclosure of the author's identity could not be upheld on the ground of the state's interest in an informed electorate. That is, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."⁵³

It is questionable whether *McIntyre*'s holding will be extended very far beyond its facts. First, the case involved the communication of a single individual circulating a homemade pamphlet, as opposed to a well-funded interest group conducting a mass media campaign. The Court specifically suggested that sponsorship identification requirements might be appropriate for corporations, even though they were unconstitutional as applied "to independent communications by an individual like Mrs. McIntyre."⁵⁴ Second, the election at issue in *McIntyre* was a referendum election where the state's interest in disclosure rests upon "different and less powerful interests" than the interest in guarding against corruption of candidates.⁵⁵ Since *McIntyre*, a majority of courts have upheld regulations requiring sponsor identification with respect to electioneering ads in support of or opposition to candidates.⁵⁶

51. 514 U.S. 334 (1995).

52. *Id.* at 357.

53. *Id.* at 348-49.

54. *Id.* at 354. Justice Ginsburg, in her concurring opinion, also distinguished the case of "an individual leafleteer" from one where "other, larger circumstances [may] require the speaker to disclose its interest by disclosing its identity." *Id.* at 358 (Ginsburg, J., concurring).

55. *Id.* at 356; see also Malcolm A. Heinicke, Note, *A Political Reformer's Guide to McIntyre and Source Disclosure Laws for Political Advertising*, 8 STAN. L. & POL'Y REV. 133 (1997) (arguing that *McIntyre* does not invalidate source disclosure rules applied to groups putting forth large-scale, organized political ads for ballot initiatives and candidate elections).

56. See, e.g., *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997) (upholding state disclosure statute); *FEC. v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 293-98 (2d Cir. 1995) (upholding federal disclosure regulations); cf. *Ark. Right to Life State Political Action Comm. v. Butler*, 983 F. Supp. 1209, 1226-30 (W.D. Ark. 1997) (denying plaintiffs' motion for summary judgment on the unconstitutionality of disclosure requirements for independent expenditures for candidate elections), *aff'd on other grounds*, 146 F.3d 558 (8th Cir. 1998), *cert. denied*, 525 U.S. 1145 (1999); *Griset v. Fair Political Practices Comm'n*, 23 P.3d 43 (Cal. 2001) (reversing, on technical grounds, judgment invalidating sponsor identification requirement and reinstating prior California Supreme Court decision upholding the requirement); *Seymour v. Elections Enforcement Comm'n*, 762 A.2d 880 (Conn. 2000) (upholding state disclosure statute), *cert. denied*, 121 S. Ct. 2594 (2001). But see *Stewart v. Taylor*, 953 F. Supp. 1047, 1055 (S.D. Ind. 1997) (discounting the distinction between candidate elections and referenda); *Doe v. Mortham*, 708 So. 2d 929, 934-35

Sponsor identification requirements interpreted to apply to genuine issue advocacy may not fare as well. Recently, the Second Circuit invalidated disclosure requirements that applied to any “political advertisement[]” that “expressly or implicitly advocate[d] the success or defeat of a candidate” and thus extended to “advocacy with respect to public issues.”⁵⁷ The definitional dispute with respect to reporting of expenditures for “express advocacy” may thus replicate itself in the context of sponsor identification requirements. And the problem remains, as we noted earlier, that the name of a sponsor may disclose little of any value to the voters.

V. POSSIBLE LINES OF ACTION

There would appear to be several possible courses of action open to secure additional disclosure of interest group contributions and expenditures for advertising in judicial elections that studiously avoids using magic words. First, disclosure proponents could seek to enforce existing reporting requirements under the authority of *Osterberg* and *Moore*. Advocates are now pursuing this strategy with respect to advertising run by the Chamber in the 2000 Ohio Supreme Court elections.

Jurisdictions that have already adopted a contextual approach to the definition of express advocacy would obviously be the most promising venues for such actions. But affirmative litigation in jurisdictions that have not yet considered the matter should be considered as well. Moreover, courts that have adopted the magic words test could be urged to reconsider their decisions in the special context of judicial elections.

For the purposes of regulating interest group advertising, judicial elections may be distinguished from ordinary elections on two grounds.⁵⁸ First, as Justice Potter Stewart recognized: “There could hardly be a higher governmental interest than a State’s interest in the quality of its judiciary.”⁵⁹ Indeed, the Supreme Court has held that litigants are constitutionally entitled to proceed before “a neutral and detached judge.”⁶⁰ The heightened interest in the impartiality of the judiciary—in reality and in appearance—has justified impositions upon core First Amendment activity that would be impermissible in other contexts.

(Fla. 1998) (striking requirement that name and address of sponsor be disclosed, while upholding requirement that advertisement state “paid political advertisement”).

57. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000).

58. For further discussion of the differences between judicial candidates and candidates for other elective office, see Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

59. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

60. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972); *see also Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 617-18 (1993) (stating that litigants are entitled to a judge free of influences “which might lead him not to hold the balance nice, clear and true”).

For example, in *Cox v. Louisiana*,⁶¹ the Supreme Court upheld a state statute that prohibited "pickets or parades in or near a building housing a court" if such activity is conducted with "the intent of interfering with, obstructing, or impeding the administration of justice."⁶² The speech restriction was permissible because observers might believe that raucous demonstrations outside of a court would exert influence upon the process of justice taking place inside.⁶³ The government was entitled to counteract this perception because it may "properly protect the judicial process from being misjudged in the minds of the public."⁶⁴

Courts have also upheld restrictions upon the activities of judicial candidates themselves. As Judge Posner has said: "Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."⁶⁵ Thus, states may forbid judicial candidates from making promises as to how particular cases will be decided and may legitimately limit their First Amendment rights in other ways.⁶⁶ If the government can regulate the actual *content* of judicial candidate speech in furtherance of its interest in maintaining the integrity of the judicial process, a showing that extensive *independent* activity in judicial campaigns threatens public confidence in impartial justice might well justify disclosure of interest group campaign finances to a greater extent than in elections generally.

A second basis for distinguishing judicial elections from other elections lies in the nature of the contest. Judicial candidates are forbidden by codes of judicial conduct from staking out positions on issues that may come before the court. The claims of interest groups to be engaged in "a mere discussion of public issues that by their nature raise the names of certain politicians" should therefore be regarded with extreme skepticism.⁶⁷ Advertising about judicial candidates is, to the contrary, electioneering in its essential nature.

Proponents of disclosure might also consider a legislative strategy, if existing reporting requirements do not govern the advertising in question. After all, *Buckley* did not foreclose the option of drafting new laws that impose disclosure requirements, while avoiding the vagueness and overbreadth concerns raised by FECA. This approach is the one currently being pursued in Congress, with the

61. 379 U.S. 559 (1965).

62. *Id.* at 560.

63. *Id.* at 565.

64. *Id.*

65. *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (invalidating overbroad canon of ethics that limited judicial campaign pledges).

66. Most recently, the Eighth Circuit upheld Minnesota's limits on the ability of judicial candidates to make personal solicitations for campaign contributions and to engage in a variety of partisan activities. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 862-63, 883 (8th Cir.) (citing cases recognizing the difference between judicial candidates and candidates for other elective offices), *cert. granted*, 122 S. Ct. 643 (2001).

67. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

McCain-Feingold and Shays-Meehan bills.⁶⁸ A bill on that model would require reporting of communications that refer to a clearly identified candidate and that are broadcast during a specified period before an election. The bright line established by the test eliminates vagueness concerns, and research into the character of advertising in judicial elections demonstrates that the standard would not be substantially overbroad.⁶⁹ This approach is not without constitutional risk, but in the context of judicial elections, it may have an increased likelihood of success.

Other strategies have also been suggested to ensure that tests following the McCain-Feingold model are solicitous of First Amendment interests. For example, the bright-line test could be drafted to create only a presumption of reportable electioneering. The burden could then be placed on the state to prove with clear and convincing evidence that any group rebutting the presumption was in fact attempting to influence the outcome of the election. Securing such evidence would admittedly be difficult, but not impossible. Groups could not mail out solicitations for funds to mount a campaign for or against a judicial candidate and then claim to be engaged in issue discussion. They could not claim to be involved in mere “educational” efforts and then celebrate the success of the advertising campaign in terms of the number of endorsed candidates who won election—as the Chamber did this past April.⁷⁰

Alternatively, or in conjunction with the rebuttable presumption, groups insisting that their advertising was a mere discussion of public issues that by their nature raise the names of certain judicial candidates, rather than an effort to influence the outcome of an election, could be given the option of filing a statement to that effect. Voluntary filers of such statements would be automatically exempt from reporting requirements, unless the state could muster proof that the statements were false. Assuming that most people see a difference between finding legal loopholes in the system and affirmatively lying to public authorities, the statements might promote more effective disclosure even if groups had no inculpatory mailings or post-election celebratory announcement to betray their true intent.

Just what information the new legislation would seek to have disclosed, and precisely what level of spending would trigger disclosure requirements, are matters more of policy than of constitutional jurisprudence. We know of no litigation since *Buckley v. Valeo* challenging the level of spending set to trigger the obligation to report in the first place, and as we noted earlier, states have a great deal of discretion in setting the monetary thresholds for contributions that trigger reporting of a donor’s identity.⁷¹ Clearly, the spending threshold should be set at a level that will capture serious players about whose involvement voters

68. See generally McCain-Feingold-Cochran Campaign Reform Bill, S. 27, 107th Cong. (2001), Bipartisan Campaign Reform Act of 2001, H.R. 2356, 107th Cong. (2001).

69. CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS* 72-73 (Brennan Ctr. 2001).

70. See *supra* note 10.

71. See *supra* note 9 and accompanying text.

could be expected to care, but in our view, there is no absolute number or mathematical formula that will yield the “right” answer.⁷² Any state seeking to draft new legislation will also face a host of questions about when, where, and how to disclose campaign financing, the details of which are beyond the scope of this Paper.⁷³

Without enforcement actions or legislative initiatives, useful disclosure will be difficult to obtain. The press might be able to ferret out some information about the financial backers of interest groups ads, as it did in the 2000 elections, but information that can be obtained in this way will almost certainly be incomplete and may not become available until after the election is over. Investigative reporting, while very much to be encouraged and obviously constitutional, is therefore likely to be far less effective in creating incentives to change interest group conduct in judicial races.

72. Richard Briffault argues that the appropriate threshold for disclosure should be the point at which an expenditure has a reasonable likelihood of affecting the outcome of a particular election—perhaps as high as five percent of the average expenditures of the winning candidate in the previous two or three elections for the particular office. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1788 (1999). In our view, the informational interests at stake suggest that the threshold might be well below that point. Frequently, it is the cumulative impact of moderate spending by a variety of related interests that has the potential for influencing outcomes. But we need information about the sources of that spending before we can assess what the influences are. That being said, we agree with Professor Briffault that the thresholds in many jurisdictions could be substantially raised and that using substantial thresholds mitigates constitutional concerns about expanding the scope of reporting requirements. *See id.* at 1788-89.

73. For a discussion of these questions, see WRITING REFORM: A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS, at ch. 8 (Deborah Goldberg ed., Brennan Ctr. 2000), which is available in hard copy from the Brennan Center for Justice and is posted on the Center’s website: www.brennancenter.org/programs/prog_ht_manual.html.

COMPELLED DISCLOSURE OF INDEPENDENT POLITICAL SPEECH AND CONSTITUTIONAL LIMITATIONS

JAN WITOLD BARAN*

INTRODUCTION

The January 25, 2001 *Call To Action* issued by participants in last year's *Summit on Improving Judicial Selection*¹ manifests a contradiction. It professes to respect the First Amendment rights of independent groups; nonetheless, it encourages governmental regulation of their political speech.² The reasons for this contradiction are simple. The First Amendment impedes regulation while besieged candidates struggle to find "solutions" for increasingly contentious judicial elections. In the past, races for the bench took place in sleepy backwaters. Such races are now attracting increased attention both because of the personalities involved³ and, more often, because of what the *Call To Action* delicately calls "the judiciary's policy-making role."⁴ Whatever the cause, the result is growing pressure to produce "modern" judicial election campaigns (i.e., campaigns that are driven by the need for money to disseminate more information to a large but often inattentive electorate through increasingly expensive modes of communication). This pressure is likely to continue. While the 1998 campaign for one of Wisconsin's seats in the United States Senate cost \$4 million for the relatively restrained Russell Feingold, the 1999 Wisconsin Supreme Court race cost "only" \$1 million for all of the candidates combined.⁵ Clearly, spending in statewide judicial races lags behind that of other statewide races.

Judicial campaigns are attracting the attention of independent groups or, as the *Call To Action* refers to them, "interest groups" (apparently disinterested

* Partner and head of the Election Law and Government Ethics practice group at the Washington, D.C. law firm of Wiley Rein & Fielding LLP. The author is a member of the ABA Commission on Public Financing of Judicial Elections. The author gratefully acknowledges the assistance of Caleb P. Burns, Wiley Rein & Fielding LLP, in the preparation of this Paper. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed herein are those of the author and do not necessarily reflect those of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Open Society Institute's Program on Law & Society, and a grant from the Joyce Foundation.

1. Symposium, *Call to Action: National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353 (2001) [hereinafter *Call to Action*].

2. See *id.* at 1355.

3. See Steven Benen, *Monumental Mistake*, CHURCH & STATE, Dec. 1, 2001, at 8 (discussion of a judicial candidate who vowed, during his campaign, to follow the Ten Commandments).

4. *Call to Action*, *supra* note 1, at 1354.

5. See Federal Election Commission, Financial Activity of Senate Campaigns 1997-1998, at <http://www.fec.gov/1996/states/wisen6.htm> (Dec. 31, 1998); Wisconsin Citizen Action, Impartial Justice Position Paper, available at <http://www.wi-citizenaction.org> (last visited Mar. 6, 2002).

groups are not a problem because of their apathy). These interest groups are creating waves in the formerly placid backwaters by engaging in advertising. Some of the ads in the 2000 judicial campaigns were critical or otherwise unflattering, and have been described as “pernicious,” “nasty,” and “muck,” although not untruthful.⁶ Even complimentary ads have been repudiated by candidates.⁷

Regardless of content, large-scale independent advertising is unsettling to any politician. By definition, independent ads must be independent of campaigns; therefore, they are beyond the control of the candidate. Moreover, advertising, particularly that which is critical, often requires a response. The need to respond, in turn, places demands on a campaign’s limited resources. Judicial campaigns generally have limited resources with which to respond. To complicate matters, judicial candidates are uniquely constrained in what they can say and do during a campaign.⁸ Rather than loosen some of the self-imposed restrictions on candidates’ conduct, the *Call To Action* searches for new ways to control independent groups (especially “outside groups,” whatever those are) which are not subject to the canons of judicial conduct.⁹

The proposals submitted by the Deborah Goldberg and Mark Kozlowski¹⁰ respond to the call for “creative ways” of regulating political speech. Unfortunately, there has been no historic lack of creative attempts to regulate independent political speech. Legislatures and agencies regularly try to impose prohibitions, limits, and disclosure requirements on interest groups. In the past three decades, the federal government has sought to restrict the political speech of particular groups. In each instance, a disfavored group communicated its approval or disapproval of candidates, public officials, or the policies they supported. The messages of these groups included calls for the impeachment of President Nixon,¹¹ opposition to Nixon’s anti-school busing program,¹² criticism of President Reagan’s position on nuclear disarmament,¹³ criticism of the voting record of a member of Congress on tax issues,¹⁴ and the dissemination of

6. *Call to Action*, *supra* note 1, at 1359; Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755 (2002).

7. See Beverly Pettigrew Kraft, *State Supreme Court Chief Justice Expresses Regrets Upon Leaving the Bench*, CLARION-LEDGER (Miss.), Dec. 24, 2000.

8. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2000) (banning judges and federal candidates from inappropriate political activity).

9. See *Call to Action*, *supra* note 1, at 1359 (discussing the need for “creative ways” to impose regulation).

10. Goldberg & Kozlowski, *supra* note 6.

11. See *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

12. See *ACLU v. Jennings*, 366 F. Supp. 1041 (D. D.C. 1973), *vacated as moot*, *Staats v. ACLU*, 422 U.S. 1030 (1975).

13. See *FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995).

14. See *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980).

members of Congress' positions on abortion.¹⁵ In 1992, a group called the Christian Action Network financed television advertisements which criticized candidates Clinton and Gore for maintaining a pro-homosexual political agenda; the ads were broadcast in the heat of the presidential election season, in the market where a presidential debate was to occur, and within two weeks of that debate.¹⁶ All of the above examples led to court cases in which the attempted regulation of the group's activities was struck down.

Efforts to ban or force disclosure of political speech run into the so-called "express advocacy" standard, as set forth in *Buckley v. Valeo*¹⁷ and its progeny. As one court put it, "[w]hat the Supreme Court did [in *Buckley*] was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."¹⁸ The most recent encounter with "express advocacy" was the Fourth Circuit decision in *Virginia Society for Human Life, Inc. v. FEC*.¹⁹ In declaring unconstitutional a Federal Election Commission regulation which sought to broaden the definition of "express advocacy," the Fourth Circuit noted that

[t]he FEC ends its argument that [its definition of "express advocacy"] is constitutional with the following comment: "if the express advocacy requirement is read too narrowly, the prohibitions of 2 U.S.C. § 441(b) will require little more than careful diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections, and from doing so without disclosing to the public the source of the influence." That is a powerful statement, but we are bound by *Buckley* and [*Massachusetts Citizens for Life*] which strictly limit the meaning of "express advocacy." If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court.²⁰

Neither imaginative Congresses nor the most recent decisions of the Supreme Court have produced such change. Likewise, Goldberg and Kozlowski's proposals will not satisfy constitutional standards; their strategy requires the overruling of one or more holdings of the Supreme Court. However, even if *Buckley* were overruled, the question would remain: how can the government compel disclosure without being unconstitutionally vague or overbroad?

In order to understand the conundrum facing judicial campaigns, an

15. See *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999).

16. See *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997).

17. 424 U.S. 1 (1976).

18. *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996). See also *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001); *Christian Action Network*, 110 F.3d at 1055; *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp. 2d 766, 768 (W.D. Mich. 1998); *W. Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036, 1040 (S.D. W. Va. 1996).

19. 263 F.3d at 379.

20. *Id.* at 392 (citation omitted).

explication of the "express advocacy" standard is necessary. Accordingly, Part I of this Paper is devoted to explaining what the standard is and why the Supreme Court arrived at that result. Part II addresses the proposals to circumvent the "express advocacy" standard. Finally, Part III describes alternative mechanisms for accommodating independent advertising.

I. THE "EXPRESS ADVOCACY" STANDARD

The Supreme Court has recognized only one governmental interest sufficient to justify the mandatory disclosure of independent groups' political activities—the prevention of corruption and the appearance of corruption.²¹ However, even this compelling interest can justify disclosure only when a speaker engages in "express advocacy."²²

Buckley addressed a provision of the Federal Election Campaign Act of 1971 (FECA), that required "[e]very person (other than a political committee or candidate) who makes contributions or expenditures . . . over \$100 in a calendar year" to file a disclosure statement.²³ The Court concluded that this statute survived strict scrutiny²⁴ because the government's compelling interest in preventing corruption and the appearance of corruption was advanced by the statute's effect of increasing "the fund of information concerning those who support . . . candidates" by helping "voters to define more of the candidates' constituencies."²⁵

However, the Court recognized that the definition of the term "expenditure," which was incorporated into the language of the disclosure provision, was not narrowly tailored to reach only those persons in whom the government had an "informational interest" in requiring disclosure.²⁶ FECA defined the term "expenditure" as, *inter alia*, any payment made "for the purpose of . . . influencing" the election of any person to federal office.²⁷ Because the disclosure provision "could be interpreted to reach groups engaged purely in issue discussion," and the government's "informational interest" was predicated purely on discerning electoral support for political candidates, the Court was concerned that "the relation of the information sought to the purposes of [FECA] may be too

21. See *Buckley*, 424 U.S. at 26-27, 78-81.

22. *Id.* at 80. The government's anticorruption interest justifies numerous restrictions on both contributions to candidates and expenditures that are either requested by or coordinated with candidates. See *id.* at 46-47. The *Call To Action* seeks constitutional ways to regulate independent, not coordinated spending. See *Call to Action*, *supra* note 1, at 1359.

23. 2 U.S.C. § 434(e) (1974), cited in *Buckley*, 424 U.S. at 74-75.

24. Strict scrutiny is applied to statutes that regulate independent speech and associational activities. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Buckley*, 424 U.S. at 75; *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

25. *Buckley*, 424 U.S. at 81.

26. *Id.* at 78-81.

27. 2 U.S.C. § 431(f) (1974), cited in *Buckley*, 424 U.S. at 79.

remote.”²⁸ Therefore, the Court construed the phrase “for the purpose of . . . influencing” to apply only to communications that include explicit words, “that expressly advocate the election or defeat of a clearly identified candidate.”²⁹

In *Buckley*, the Court discussed the dangers of not narrowly tailoring regulation of political speech to that of “express advocacy.”³⁰ The Court also observed that the constitutionally protected discussion of issues includes the discussion of political candidates,

[f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.³¹

The Court warned that, if regulation of political speech was not circumscribed to keep the discussion of candidates distinct from express calls for electoral action, general political discourse would be chilled and First Amendment rights would be violated.³² The Court remedied this problem by formulating the “express advocacy” standard, which limits the reach of regulation “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’”³³ Indiana Chief Justice Randall T. Shepard has noted that, at election time, “a veritable Niagara of ideas will flow.”³⁴ To borrow the metaphor, under *Buckley* the government may not dam Niagara; it may only regulate a narrowly defined tributary of the cascading speech.

The Court in *Buckley* recognized that the bright-line “express advocacy” formulation would *not* reach all “partisan discussion,” explaining that partisan speech cannot be burdened unless it “expressly advocate[s] a particular election result.”³⁵ “So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.”³⁶ The Court determined that protecting partisan statements was constitutionally necessary in order to prevent chilling First Amendment rights. Regulation of political speech with a less “clear-cut distinction between discussion, laudation,

28. *Buckley*, 424 U.S. at 80.

29. *Id.* at 43, 80 (footnote omitted).

30. *See id.* at 78-80.

31. *Id.* at 42.

32. *Id.* at 43-45.

33. *Id.* at 44 n.52.

34. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083 (1996).

35. *Buckley*, 424 U.S. at 80.

36. *Id.* at 45.

general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers. . . ."³⁷ "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."³⁸

The "express advocacy" standard was reaffirmed by the Supreme Court roughly a decade later in *FEC v. Massachusetts Citizens for Life* ("MCFL").³⁹ The Court decided *MCFL* by directly quoting the "express advocacy" standard from *Buckley*, and applying *Buckley*'s core reasoning and its demand for "explicit words" that "expressly advocate" electoral action.⁴⁰

Every federal court of appeals that has discussed *Buckley* and *MCFL* has agreed that the test established by those cases demands explicit words of "express advocacy."⁴¹ No federal court of appeals has ever read *MCFL* to modify *Buckley*'s "express advocacy" test. However, in *FEC v. Furgatch*⁴² the Ninth Circuit caused confusion on this point by overlooking the then just-decided *MCFL* opinion and holding that "express advocacy" need not include express

37. *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

38. *Id.* Section 437(a) of FECA attempted to require disclosure by any group that published or broadcast material referring to a candidate or setting forth the candidate's position on any public issue, his voting record or other official acts. See *Buckley v. Valeo*, 519 F.2d 821, 869-70 (D.C. Cir. 1975). In striking down section 437(a) of FECA, the Court of Appeals for the D.C. Circuit cited many of the First Amendment concerns that later motivated the Supreme Court's "express advocacy" standard.

Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.

Id. at 875, quoted in *Buckley*, 424 U.S. at 43 n.50. Yet, the court still found section 437(a) unconstitutional because its regulation of communications that invoked the names of candidates could apply to "protected exercises of speech" and could "deter[] . . . expression deemed close to the line." *Id.* Section 437(a) was so indefensible that its overturning was not even appealed to the Supreme Court.

39. 479 U.S. 238 (1986).

40. *Id.* at 249.

41. See *Va. Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 390 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187-88 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 968 (8th Cir. 1999); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); see also *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction); *Perry v. Bartlett*, 231 F.3d 155, 161-62 (4th Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 269 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1053-55 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 469-70 (1st Cir. 1996); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52-53 (2d Cir. 1980).

42. 807 F.2d 857 (9th Cir. 1987).

words of advocacy, but could be based on a broader contextual examination of the speech.⁴³ *Furgatch* ignored *MCFL*. *MCFL* was issued in mid-December 1986, and *Furgatch* was released in early January 1987. *Furgatch*, which may well have been finalized and approved before *MCFL* was issued, cites the First Circuit's decision in *MCFL*,⁴⁴ but does not mention, much less discuss, the Supreme Court's *MCFL* ruling. Because *Furgatch* overlooked *MCFL*'s reaffirmation of the "express advocacy" standard, *Furgatch* is dubious precedent. The few state court cases that have cited *Furgatch* are, therefore, also of little or no authoritative value.⁴⁵ Only one federal district court decision, currently on appeal to the Fifth Circuit, has interpreted *Buckley* and *MCFL* differently.⁴⁶

The conclusion to be drawn from *Buckley*, *MCFL*, and their progeny is that the government can compel independent private groups to disclose certain information only when they engage in political speech that contains "express advocacy."⁴⁷ Without this limitation, a statute is not narrowly tailored to the government's "informational interest" in allowing the public to discern electoral support for political candidates. Disclosure requirements that are not narrowly tailored result in impermissible chilling of First Amendment rights.

II. ATTEMPTS TO CHANGE OR CIRCUMVENT THE "EXPRESS ADVOCACY" STANDARD

Some would shift the balance created by *Buckley* and *MCFL* far the other way. Commentators propose a rule that any criticism (or praise) of a government official, while that official is a candidate, is—or at least may be—regulated in the same manner as express advocacy.⁴⁸ Not even *Furgatch* supports such a Draconian curtailment of First Amendment rights. The First Amendment protects the right to publicly discuss, praise, or criticize high government officials, even when the criticism is "pernicious." Indeed, *Buckley* considered

43. *Id.* at 863.

44. *Id.* at 861.

45. See, e.g., *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 7 (Or. Ct. App. 1999), review denied, 994 P.2d 132 (Or. 2000); *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 733 (Wis.), cert. denied, 528 U.S. 969 (1999). In *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000), the ad in question used explicit words of express advocacy. See *id.* at 36.

46. *Chamber of Commerce v. Moore*, No. 00-600779 (5th Cir. Apr. 5, 2002). The author is counsel to the Chamber of Commerce in the appeal. As this issue went to print, the Fifth Circuit reversed and remanded the case. *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002).

47. See *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1193-95 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000); *N.C. Right to Life v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 275 (4th Cir. 1998); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52-53 (2d Cir. 1980).

48. See Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 CATH. U. L. REV. 107, 107-09 (1999).

and rejected any test that turned on "laudation" or criticism of a candidate.⁴⁹

Accordingly, the "contextual approach" proposed by Goldberg and Kozlowski,⁵⁰ in reliance in part on the district court opinion in *Chamber of Commerce v. Moore*,⁵¹ will not work. Even a casual reading of *Buckley* reveals that the *Moore* court erred in concluding that ads could be regulated because they mentioned issues ("victims' rights" and "common sense judicial philosophy") without elaboration.⁵² The *Moore* court found "express advocacy" on the basis that the Chamber of Commerce's ads described an incumbent's "background and experiences" and because the judge perceived laudation as "obviously designed to exhort support."⁵³ This is entirely contrary to *Buckley* and creates a vague and unenforceable standard.

Goldberg and Kozlowski suggest another way of regulating political speech that goes beyond explicit words of advocacy.⁵⁴ They advance a recently proposed theory similar to the "McCain-Feingold"⁵⁵ and "Shays-Meehan"⁵⁶ bills which regulate "electioneering communications" (i.e., speech that merely "refers to a clearly identified candidate" within a particular time period before an election.). The bills propose to prohibit any corporation (including non-business, not-for-profit corporations) or any union from financing a public communication that refers to a candidate thirty days before a primary election and sixty days before a general election. Other speakers would be subject to disclosure requirements. These proposed "electioneering communication" provisions likely would not survive a constitutional challenge.⁵⁷ They suffer from the same problems present in the FECA provisions addressed in *Buckley*. They do not regulate categorical communications of electoral support, but instead apply to any communication that merely refers to a candidate. These proposed bans on invoking candidate names during ninety days in an election year are unconstitutionally overbroad. Similarly, it is irrational to require disclosure merely because a candidate's name has been uttered on a certain day. The only previous Supreme Court case to examine a similar proposal struck down a one-day ban.⁵⁸ It is no wonder, then, that Goldberg and Kozlowski note that "[t]his approach is not without constitutional risk."⁵⁹

Goldberg and Kozlowski suggest creating a rebuttable presumption of

49. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

50. Goldberg & Kozlowski, *supra* note 6, at 765.

51. *Chamber of Commerce v. Moore*, 3:00-cv-778WS (S.D. Miss. Nov. 2, 2000).

52. *Id.* at 25.

53. *Id.*

54. Goldberg & Kozlowski, *supra* note 6, at 766-67.

55. S. 27, 107th Cong. § 201 (2001) ("McCain-Feingold").

56. H.R. 2356, 107th Cong. § 201 (2001) ("Shays-Meehan").

57. The government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963), *quoted in* *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996).

58. *Mills v. Alabama*, 384 U.S. 214, 220 (1966).

59. Goldberg & Kozlowski, *supra* note 6, at 767.

“express advocacy.”⁶⁰ A presumption is an “inference in favor of a particular fact.”⁶¹ Recognizing that the discussion of issues and political candidates are often conflated, the Supreme Court’s “express advocacy” requirement effectively created a presumption *against* regulation of political speech.⁶² Creating a presumption to the contrary would directly contravene *Buckley*, *MCFL*, and their progeny, which all require a presumption in favor of free discussion, not regulation.

Goldberg and Kozlowski also suggest that the different roles of judges and members of the so-called “political” branches may alter the application of First Amendment principles to judicial elections.⁶³ This argument is based on the notion that the government has a compelling interest in assuring that judges can execute their unique job functions, and that this compelling interest can justify regulation beyond “express advocacy.” There can be no doubt that the government has a compelling interest in maintaining the integrity of the judiciary. However, in order to properly assess the application of this government interest, “judicial integrity” must first be defined.

As a primary matter, the government’s interest is grounded in the differences between legislators and executives on the one hand, and judges on the other. The job of a legislator or an executive is to represent his or her constituents with respect to every professional decision made. The success of legislators and executives is measured by the degree to which these decisions advance the interests of a majority of the electorate. The job of a judge is much different. Though a judge’s constituents for electoral purposes are also the electorate, while on the bench a judge’s constituents consist only of individual litigants. As a result, a judge’s success is measured by how well he or she “represents” the litigants by impartially protecting their rights throughout the judicial process.

This difference is crucial. Judicial integrity is not grounded in abstract concepts such as the dignity of the bench or the image of the profession, but in the due process rights of present and future litigants.⁶⁴ These due process rights guarantee litigants a neutral adjudication by the judge presiding over their case.⁶⁵ Judicial integrity, therefore, is grounded in the ability of judicial candidates and judges to decide cases in a neutral manner. The government’s interest in judicial integrity is an interest in the integrity of judicial candidates and judges themselves. Only judges have the power to adversely affect the due process rights of future litigants by deciding their cases in a biased fashion.

A recent federal court of appeals case invoked the government’s interest in judicial integrity to uphold restrictions on judicial candidates’ First Amendment

60. *Id.* at 765.

61. BLACKS LAW DICTIONARY 1185 (6th ed. 1990).

62. *See Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976).

63. Goldberg & Kozlowski, *supra* note 6, at 765-67.

64. For a full discussion on judicial integrity as the maintenance of the due process rights of litigants, see Shepard, *supra* note 34, at 1083-92.

65. *See id.*

rights.⁶⁶ *Republican Party of Minnesota v. Kelly* addressed state judicial canons which prohibited judicial candidates from identifying themselves with political parties and announcing their views on disputed legal issues. The canons survived strict scrutiny and were upheld by the court because they were narrowly tailored to advance the state's compelling interest in judicial integrity.⁶⁷ The court set the tone for its opinion by stating that "a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order."⁶⁸ The court determined that the state had convincingly demonstrated that, when judges identify themselves with political parties and announce their legal views on various issues, the ability of judges to neutrally adjudicate cases is sacrificed.⁶⁹

The *Republican Party of Minnesota* court noted, however, that the canons could not survive strict scrutiny if they had regulated activity by persons other than judicial candidates. "[B]ecause the State's compelling interest is in the rectitude of the candidate, a narrowly tailored restriction will regulate expressions by the candidate, not third parties."⁷⁰ "The government has an interest in the manner in which its elected officials conduct themselves while in office. The government does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for those offices."⁷¹ Presumably, the government's interest also does not justify harassment of third parties through compelled disclosure. Consequently, judicial integrity may be a compelling government interest in support of restrictions on judicial candidates, but not on third parties.⁷²

In sum, the express advocacy standard was established to permit the greatest

66. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), cert. granted, 122 S. Ct. 643 (2001); see also Shepard, *supra* note 34, at 1071-74.

67. *Republican Party of Minn.*, 247 F.3d at 885.

68. *Id.* at 864.

69. See *id.* at 868-72, 876, 879, 881.

70. *Id.* at 874.

71. *Id.* at 873-74 (quoting *Cal. Democratic Party v. Lungren*, 919 F. Supp. 1397, 1402 (N.D. Cal. 1996)).

72. The case of *Cox v. Louisiana*, 379 U.S. 559 (1965), is not to the contrary. See *Buckley v. Valeo*, 424 U.S. 1, 18 (1976). *Cox* addressed a Louisiana statute that criminalized picketing and parading near a court house done "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty. . . ." *Id.* at 560 (quoting LA. REV. STAT. ANN. § 14:401 (West 1962)). Part of the Court's explanation of the statute's constitutionality was that a "State may also properly protect the judicial process from being misjudged in the minds of the public." *Id.* at 565. Arguments that this statement can justify disclosure requirements of interest group activities surrounding judicial elections are misguided. As evidenced by the quoted language of the statute, *Cox* concerned conduct that could have an immediate effect on pending court cases, given the proximity of the illegal conduct to the court house. Analogies to *Cox* fit more appropriately in the Court's line of cases addressing content-neutral "time, place and manner" restrictions, and not in a discussion of content-based regulation of judicial electoral activity by interest groups. See *Burson v. Freeman*, 504 U.S. 191, 197 (1992), and cases cited therein.

range of unencumbered independent political expression. Proposals that seek to deviate from the standard must advance a valid government interest, avoid vagueness, and not be so broad as to encompass legitimate commentary about politicians and policies. The proposals advanced to date in legislatures and by Goldberg and Kozlowski are all deficient in one or more of these respects.

III. ALTERNATIVES

The *Call To Action* implies, and Goldberg and Kozlowski state, that the appropriate response to independent advertising is to reduce or eliminate it through regulation.⁷³ This view requires two assumptions. First, one must assume that constitutional regulation is possible. As noted above, regulation of independent political advertising is, at the least, highly problematic. Second, one must assume that there would be no evasion of additional regulation.⁷⁴

Whether compelled disclosure would be either effective or constitutional, there are alternatives. Of course, the best alternative is not to have elected judges. States have refused to adopt or expand merit selection of judges; nonetheless, the call for merit selection should continue. Additionally, steps can be taken to provide judicial candidates with more resources.

Public financing of judicial campaigns can provide neutral funding, reduce fundraising pressure, and give candidates more money to either inform voters or respond to advertising by others. Linking public funding with spending limits on campaigns will potentially exacerbate the disparity between campaign resources and activities by independent groups. Therefore, generous funding with high or no limits should be adopted. The ABA Commission on Public Financing of

73. Goldberg and Kozlowski candidly assert that “pernicious” speech will be reduced through compelled disclosure because “[m]ajor donors might be willing to bankroll nasty advertising campaigns as long as their involvement can be concealed.” Goldberg & Kozlowski, *supra* note 6, at 755, 757. Such a motive for regulation raises many constitutional issues beyond the scope of this Paper. One question is whether the compelled disclosure would create the type of “chill and harassment” that *Buckley* said would exempt even independent “express advocacy” from disclosure. *Buckley*, 424 U.S. at 82 n.109.

74. For example, a state could pass a law prohibiting certain groups (e.g., corporations and unions) from financing television ads that name a candidate for judicial office during the thirty days before an election. Assuming that such a statute is constitutional (which is unlikely), an incorporated entity or union could, nonetheless, run an ad such as this:

There is a judge who has never upheld a death penalty case. We can't tell you the name of this person because the judge also upheld a state law that makes it a crime for us to tell you. Please go to the following bar association website to find out who your judges are and don't forget to vote.

The Supreme Court noted in *Buckley*, that one should not “naively underestimate the ingenuity and resourcefulness of persons and groups” who would not have “much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.” *Id.* at 45. The same will likely be true of alternative standards employed in the future to regulate speech.

Judicial Campaigns has proposed generous funding with high limits.⁷⁵ While only Wisconsin currently provides a form of public financing, this concept could be and should be promoted elsewhere.⁷⁶

In addition to public financing, the response to "interest group" advertising will come from other "interest groups." First and foremost, there is the press. Journalists and editorialists report, scrutinize and analyze controversial advertising. The accuracy of third party statements will be debated in the press. The sponsors of advertising are known either locally or nationally.⁷⁷ Their reputations and credibility will be at stake. This democratic mechanism should not be underestimated.

In addition, other public advocates will engage in the debate. Members of the bar, representatives of bar associations and sponsors of opposing independent advertising all have responded in the past to controversial ads. Their right to do so without further regulation will be preserved and will add to the debate.

In conclusion, when speech is perceived as "pernicious," perhaps Justice Brandeis' words should be heeded: "[T]he remedy to be applied is more speech, not enforced silence."⁷⁸

75. ABA Commission on Public Financing of Judicial Campaigns, Report (July 2001), at <http://www.ilcampaign.org/reports/JudicialFinancingReport.pdf>.

76. WIS. STAT. ANN. § 11.50 (1996 & Supp. 2002).

77. As Goldberg and Kozlowski note, "[w]hen the advertiser is the [U.S.] Chamber [of Commerce], the interest served by the ad is reasonably clear." Goldberg & Kozlowski, *supra* note 6, at 757. In one of history's many coincidences, both the Chamber of Commerce and the ABA Commission on Judicial Ethics were founded at the behest of the same individual, William Howard Taft.

78. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

JUDICIAL CAMPAIGN CONDUCT COMMITTEES

BARBARA REED*
ROY A. SCHOTLAND**

I. WHERE JUDICIAL CAMPAIGN CONDUCT COMMITTEES FIT IN THE OVERALL PICTURE

When all is said and debated about First Amendment limits on what regulation, if any, can be applied to judicial campaign conduct, three lessons stand out:

A. Lesson One—Florida and Ohio's Approach

The initial First Amendment decision against a canon limiting judicial campaign conduct was by a Florida federal district judge, striking a canon provision that said “a candidate . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of his duties . . . [or] announce his views on disputed legal or political issues”¹

That decision relied on the simplistic mantra that once a State decides to elect judges, judicial elections must be like other elections: “[W]hen a state decides that its trial judges are to be popularly elected . . . it must recognize the candidates’ right to make campaign speeches *and* the concomitant right of the public to be informed about the judicial candidates.”² Subsequently, the stricken provision was revised. The same provision had been upheld six years earlier by an Ohio federal district court judge, and subsequently affirmed by the Sixth Circuit Court of Appeals.³ These decisions were not even cited by the Florida federal judge. But that is only the beginning—and by far the lesser part of the lesson, which is: Florida and Ohio have done the most to preempt, and if necessary take steps against, inappropriate judicial campaign conduct. Their effort is described below.

Given that Florida experienced a notable decision invalidating their effort to

* Counsel and Policy Director, The Constitution Project. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the authors and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

** Professor, Georgetown University Law Center.

1. FLA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1994).

2. *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (emphasis in original). Neither party requested oral argument in this decision for a preliminary injunction, *id.* at 1095, and the Bar did not appeal the court’s granting of a preliminary injunction barring the enforcement of Canon 7(B)(1)(c). *Id.* at 1199. (A retrospective note: counsel for the Bar was Barry Richard, lead counsel for George W. Bush in Florida during 2000 election dispute.). In 1991, a permanent injunction against the Canon was issued.

3. *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984), *aff’d*, 861 F.2d 719 (6th Cir. 1988).

limit judicial campaign conduct, and Ohio experienced a completely opposite decision, it is striking that it is those two States that are unique in having substantial, structured efforts to pre-empt and prevent misconduct in judicial campaigns.⁴ These two systems, in place since the mid-1990s, are a model for action. Moreover, the Florida experience shows that, whatever one's view of how the First Amendment affects attempts to limit inappropriate judicial campaign conduct, it does not stop effective, aggressive efforts.

Florida's effort, begun in 1998, is carried out by the State's Judicial Ethics Advisory Committee ("JEAC") made up of ten judges (including a rotating chairperson) and one attorney, with staff support. The JEAC renders "advisory opinions to inquiring judges [on] the propriety of contemplated judicial and non-judicial conduct."⁵ Starting with the 1998 elections, the JEAC has performed two functions. For the 1998 and 2000 elections, it conducted campaign conduct forums in every circuit with a contested judicial election (fifteen forums in 1998, sixteen in 2000), for candidates and campaign consultants. Every forum is attended by the chief judge of the particular circuit and a high-ranking representative of the bar. Their "course" material—with a cover page declaring "Play by the Rules . . . or else . . ."⁶ is already serving as a model for other States.⁷ The JEAC's Election Practices Subcommittee provides quick responses to campaign questions; in addition to informal responses, opinions are posted promptly on a website. Moreover, the Florida Supreme Court, newly empowered by recent constitutional revision, last year removed a judge from office because of his misconduct in a campaign.⁸

Ohio's Supreme Court revised its canon in 1995 to start a two-part effort to limit inappropriate judicial campaign conduct. First, early in each campaign year, all judicial candidates are required to complete a two-hour course on campaign conduct and finance, to which "candidates are encouraged to bring campaign committee members and other volunteers."⁹ Second, the court's "rules

4. Nevada will have a similar effort active for 2002. And for recent action in Louisiana, Mississippi, and New York, see *infra* notes 35-36 and *infra* text accompanying notes 32-33.

5. Pet. of the Comm. on Standards of Conduct for Judges, 327 So. 2d 5 (Fla. 1976). The committee name was changed to JEAC in 1997. Pet. of the Comm. on Standards of Judges, 698 So. 2d 834 (Fla. 1997).

6. See Appendix A, *infra*, for a few pages of their material.

7. For 2002, the JEAC is considering reducing the number of forums by regionalizing them. Also, it may hold the forums earlier than before. They were held in late July, immediately after the formal filing date for candidates, but that is too close to the September primary, which in fact is the final election for almost all judicial candidates, and it comes after some significant campaigning.

8. *Inquiry re Matthew E. McMillan*, 797 So. 2d 560 (Fla. 2001). Charges included "(1) making explicit campaign promises to favor the State and the police in court proceedings; (2) making explicit promises that he would side against the defense; (3) making unfounded attacks on an incumbent county judge; (4) making unfounded attacks on the local court system and local officials. . . ." *Id.* at 562.

9. Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1456 (2001). Prepared for the December 2000 Chief Justices' Summit,

governing judicial discipline [include] expedited procedures for reviewing and resolving judicial campaign complaints.”¹⁰ Of the eleven actions that have gone through Ohio’s process, seven resulted in either a preliminary finding or final order before the election, and the “slowest” action took five months after the misconduct occurred.¹¹

B. Lesson Two—Enforcement Is Rare

Wholly apart from possible First Amendment hurdles that prevent or inhibit enforcement of canon provisions limiting campaign conduct, the unsavory fact is that although enforcement has been active in a handful of States (and localities), in many or most places enforcement is rare, and fear of enforcement is little or none. Moreover, much campaign conduct defies any view that judicial campaigns should be above the gutter, let alone different from other campaigns. Finally, what keeps most judicial campaigning different from other campaigning is a combination of the norms for such campaigns, which rest on the candidates’ professionalism, respect for the bench, and concern to protect the public’s respect for the bench and the fact that in so many campaigns, the norms are not tested by significant—or even any—competition.

We may all point with alarm to problematic advertisements in 2000;¹² however, while earlier years were quieter, there were undeniable indications that the system was vulnerable.

C. Last Lesson—Judicial Campaign Conduct Committees Bridge the Gap

Campaign conduct oversight committees—some of which are official, some quasi-official, and some unofficial committees of diverse community leaders—can make a major difference in curbing inappropriate judicial campaign conduct. First, at the outset of campaigns, they can educate candidates about why judicial campaigns are different, and therefore what kinds of conduct are deemed inappropriate. Second, during campaigns, oversight committees can be available to respond to candidate requests for advice. They can receive complaints about conduct deemed inappropriate, or even take the initiative to try to discourage or stop such conduct. They can also reach out to non-candidate groups (political parties, political leaders and the variety of civic groups that may be active in judicial campaigns) to try to discourage advertising or other conduct that, in the view of the committee, is inappropriate. Finally, at any time, so long

Dove’s article provides all the information regarding the Ohio committees, as well as that for other States.

10. *Id.* at 1463.

11. *Id.* at 1463-64. In addition to the expedited process, a complaint may go on the “normal track,” with an investigation by the Supreme Court’s disciplinary counsel. One matter was pursued by disciplinary counsel on that track after the complaint had been dismissed, post-election, by the candidates who had filed it.

12. See Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669 (2002).

as they act only after fully fair process, they can present to the public their views of why certain conduct is inappropriate.

A few such committees (for example, unofficial local ones, initiated by local bar associations) have been active for over a decade.¹³ Then, starting in 1995 in Ohio, spreading in 1998, and with the trend strengthening since, official and other committees have emerged. We consider here the types of problems such committees can act upon; the three types of committees: official, quasi-official and unofficial; the strengths and weaknesses of each type, and the inherent weaknesses of all such efforts; concluding with recommendations for future action.

II. THE PROBLEMS ON WHICH SUCH COMMITTEES CAN ACT

So far, campaign conduct committees have dealt only with problematic advertisements, and that is bound to remain their main or sole focus. But as we note briefly below, committees should seriously consider the possibility of not ignoring problematic campaign finance conduct. Problematic ads fall into three main categories: factual misstatements; "signaling" and near-promises; and attack ads. At their most innocent, attack ads state accurate, but negative, facts about the opponent; at their most damaging, they assail judges for specific decisions in which they participated, or attack lawyers for specific clients they represented, and/or engage in misrepresentation or falsehood.

Professor Champagne provides an unprecedented picture of judicial campaign ads,¹⁴ and there seems little or no need for more examples of campaign conduct that almost all of us would call undesirable, and many of us seek to stop. However, while unquestionably 2000's judicial campaigns were dimensionally different from previous years, no one should think such conduct is new.¹⁵

Judicial campaign conduct committees could also help preempt or discourage campaign finance practices that, though legal, are damaging deviations from the community's norms. Examples of the practices include: An incumbent is believed to be engaging in raising campaign funds in ways that may not be a provable violation of the ban on personal solicitation; a challenger, acting as if she will run for a nonjudicial office, begins fundraising before the period allowed for judicial campaign fundraising—and then announces her candidacy for a judicial race, offering to return funds to any contributor who wishes; and an incumbent justice, in a jurisdiction which limits individual contributions but does

13. See Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 L.J. & POL. 57, 91-93 n.92, 128-29 (1985).

14. Champagne, *supra* note 12.

15. In addition to the 2000 elections' ads examined in Professor Champagne's paper, earlier horrors are noted in Schotland, *supra* note 13, at 66, 79-80, and in *Choosing Justices: Reforming the Selection of State Judges*, in UNCERTAIN JUSTICE: POLITICS IN AMERICA'S COURTS 77, 101-02 (2000). The 2000 campaigns are examined (mainly as to campaign finance) in Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849.

not impose any aggregate limit on law firms, raises an unprecedented proportion of his funds from a single firm, its members, employees and their spouses, and the firm's PAC. Moreover, the contributions are received just before the justice votes to review a verdict which awarded record damages, and the contributing firm had a one-third contingency interest in the matter.¹⁶

No existing campaign conduct committee has taken on campaign finance problems. However, campaign contribution and spending patterns in judicial races should do more than merely abide by legal limits: candidates should adhere to the jurisdiction's norms or else be ready to account to the public for deviating from the norms.

III. THE THREE TYPES OF COMMITTEES; THEIR POWERS, PROCEDURES, AND MEMBERS

A. *Official Committees*

Along with the official committees established in Florida and Ohio,¹⁷ at least two other states have also adopted an official committee model.

1. *Georgia's Approach.*—In late 1997, Georgia's Judicial Qualifications Commission ("JQC"), the official body responsible for judicial discipline, adopted a rule establishing a three-person special committee to oversee campaign conduct (in Georgia, judges run in nonpartisan, contestable elections). This step reflected concern about a troublesome 1996 campaign for an intermediate appellate seat. The committee's members are, by rule, the senior member of each of the three categories of JQC members: one private attorney, one judge and one "lay person," plus the JQC's full-time director as an *ex officio* member. The initial members were the JQC's chairman, a lawyer, an intermediate appellate judge, and a prominent businessman.

The committee's sole power is to issue statements. It may do so after an expedited but thorough process (of course, affording to the candidate complained against an opportunity to respond), either upon complaint or on its own initiative. This procedure was upheld as constitutional by a federal district court in 2000, although the court also upheld a facial challenge to the particular provision in Georgia's canon.¹⁸

16. This is a ninety-percent-literal statement of the conduct of two Ohio Supreme Court justices in 1998. They voted as the firm had hoped. The defendant's motion for recusal was never ruled upon. *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000). The facts are set forth in Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1503-04 (2001).

17. The Florida committee was established in 1998 and the Ohio committee in 1995. *See supra* Part I.A.

18. The court upheld the system as one that "offers the constitutionally preferred cure of more speech. The Rule does not give the Special Committee the power to censor or prohibit speech, to impose fines or other criminal sanctions, or to institute or prosecute disciplinary actions. It only allows the Special Committee to make a public statement." *Weaver v. Bonner*, 114 F. Supp. 2d

2. *Nevada's Approach*.—In 1997, Nevada's Supreme Court established a Standing Committee on Judicial Ethics and Election Practices, which serves as the appellate body for judicial discipline cases, renders advisory opinions to judges throughout the year, and adjudicates disputes between candidates, whether they are already judges or not. The Standing Committee has twenty-eight members, with four judges appointed by the court, twelve lawyers appointed by the state bar, and twelve "public members" appointed by the governor (but these twelve do not participate in the non-election advisory opinion process). They have strong staff support through the state bar's general counsel/executive director.

The Committee divides into five-person panels to handle complaints. Initiated for the first time in 2002, and before candidates formally file for election, the Committee will provide "proactive and advance education . . . to hold down complaints and avoid violations."

*B. Quasi-official Committees: Alabama, Michigan and South Dakota*¹⁹

In February 1998, the Alabama Supreme Court appointed a twelve-person "Judicial Campaign Oversight Committee," all private citizens, including nonlawyers with reputations for the "utmost integrity." The twelve members were appointed by the Alabama Supreme Court, two other courts and the Circuit Judges' Association. The 1998 members included a homemaker, a businessman, two retired judges, an active judge, a member of the clergy, a mayor, a lawyer and former congressman, a farmer, a prosecutor, a public service leader, a campaign manager, and another lawyer (who was the chair of the court's Standing Committee on Rules of Conduct and Canons of Judicial Ethics). In 2000, the Committee was expanded to twenty-six members, all lawyers and judges appointed by the supreme court.

In 1998, as a result of increased complaints throughout the 1996 campaign cycle, the Michigan bar²⁰ created five five-person regional panels, made up of lawyers and nonlawyers, to oversee campaign conduct issues; they offered all

1337, 1345-46 (N.D. Ga. 2000) (citations omitted). See also Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 705-07 (2002).

19. In February 1998, the South Dakota Supreme Court ordered that candidates must complete a two-hour course on campaign practices, finance, and ethics sponsored and approved by the Judicial Qualifications Commission; (2) in every year with a circuit court election, a Special Committee on Judicial Election Campaign Intervention shall be created . . . to issue advisory opinions and to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office.

The committee consists of five persons: two former members of the JQC appointed by the JQC chair; two former members of the state bar's disciplinary board, appointed by its chair; and a retired judge or justice appointed by the chief justice. The members of the JQC and Special Committee, and their counsel and staff, have absolute immunity for acts in the course of duty. See Appendices to SDCL 12-9 and 16-1A.

20. Michigan is a mandatory bar State.

candidates in contested judicial elections the opportunity to participate in the oversight program.²¹ If a candidate did not participate, a panel could still investigate allegations of “false, misleading, unfair, unethical or illegal statements” and make public comment and/or refer the matter to the Attorney Grievance Commission or the Judicial Tenure Commission.

In the 1998 primary elections for Michigan trial judges, there were 101 uncontested races and sixty-one contested races with 121 candidates, eighty-four of whom participated in the oversight program. Of the general election’s ninety-four candidates, sixty-nine participated. During the primary, the panels reviewed only one inquiry, which resulted in the candidate’s agreement to alter conduct. The general election produced six requests for action, four of which were dismissed and two that resulted in immediate agreements to alter conduct. Although the bar endorsed continuation of the panels for 2000, they were not continued.

C. Unofficial Committees

Unofficial committees have existed for more than a decade in some localities and are currently employed in eighteen localities over five states. Moreover, North Carolina and Ohio have each, on single occasions, employed the unofficial committee model.

In 1990 in North Carolina, a state bar association committee chairman formed a committee that sponsored debates on public television between statewide candidates, and also published 550,000 copies of a voters’ pamphlet on judicial candidates (after raising nearly \$50,000 to subsidize the pamphlet’s creation) distributed shortly before the election in the main Sunday newspapers. The committee included former Chief Justice Rhoda Billings and a former justice, plus some twelve citizens who were diverse in gender, geography, ethnicity, and professions, but all of whom were leaders or representatives of notable community groups. The committee began its efforts at the end of August and was ready to receive and respond to campaign complaints, but none were submitted (in fact, the only problematic conduct was by one of the state party chairmen).

During 1992, a similar effort was initiated in Ohio by members of a Columbus campaign oversight group that had been functioning in Franklin County for several election cycles. The State Committee of Citizens, chaired by

21. For a valuable report, see Thomas K. Byerley, *Judicial Campaign Ethics Experiment*, MICH. B. J. 318 (March 1999). Byerley serves as regulation counsel for the Michigan State Bar, and notes that

one major concern [leading to the effort] was that there was no prompt way to address allegedly improper campaign tactics. . . . [A]n “aggrieved” candidate could only file a complaint [and] the investigations . . . took considerable time Even if a candidate violated ethics rules during the campaign, many times no discipline was ultimately imposed As with any experimental program, lessons were learned

Id. at 318, 319.

a former federal district judge, had the same goals as the North Carolina effort noted above. However, the State Committee of Citizens collapsed after it failed to secure agreement from supreme court candidates on limiting campaign contributions and spending—each candidate was willing to limit one but not the other.

In 1985 in Columbus, Ohio, the county bar president initiated an oversight committee of lawyers and nonlawyers. The committee succeeded in stopping one advertisement that stated, “Elect Judge X” although X had never been a judge, and another ad that attacked a candidate for having represented a particular criminal defendant. The committee chairman was the local Catholic bishop, who had been a lawyer earlier in his career. The committee, now known locally as the “Bishop’s Committee,” still exists, with eleven members appointed by the county bar president (with the consent of the bar’s board of governors). Of the eleven members, three must be nonlawyers, and not more than five may be from one political party. Before taking any action or releasing any statement, the committee must have seven votes in favor of such a course. Cleveland and Youngstown have recently begun similar efforts.

In addition, San Mateo County, California, has had such a committee since approximately 1980;²² similar committees can be found in Santa Clara County, California, and King County (Seattle), Washington. In Florida, the Miami-Dade bar association has an active committee. Five other Florida counties have committees of which we learned only at the completion of this Paper: Broward, Escambia-Santa Rosa, Orange, Palm Beach, and Volusia.²³

New York moved dramatically on this matter in 2001. New York’s pioneer is the Erie County (Buffalo) bar, which around 1985 started a committee of three board members plus the board’s chairman. Each member serves for three years. An effort is made to appoint lawyers with a background in professional ethics or judicial campaigns. And in 2000, the Monroe County (Rochester) bar resumed an effort it had made in the mid-1980s; the committee consists of several bar officers.²⁴

D. Two Additional Factors

1. What Some Committees Have Done.—After Alabama’s 1998 election, the Judicial Campaign Oversight Committee submitted a full report to the court, noting its outreach efforts which brought candidates together (many opponents had not met before); that most candidates signed pledges;²⁵ and that it responded to 350 inquiries and referred about ten complaints to the state bar or judicial inquiry commission. “A nicer election,” the *Birmingham News* editorialized on November 9, 1998. “Overall . . . it was a much cleaner campaign than in

22. For the entire San Mateo plan, see Schotland, *supra* note 13, at 91-93.

23. Information on whom to contact in all six counties can be provided by the authors of this Article.

24. See *infra* text accompanying notes 32-33.

25. See *infra* Part II.D.2.

previous years.”²⁶

In 2000, an enlarged committee received about thirty complaints or inquiries; however, they did not submit a report. Strikingly, although five supreme court seats were contested with such intensity that over \$13 million was spent, and a major litigation arose over one campaign ad, Alabama was dramatically more decorous than Illinois, Michigan, and Ohio, which had similar hotly-contested races.²⁷

2. *Candidate Pledges.*—Many committees of all three types ask candidates to sign pledges. Michigan’s 1998 state bar effort secured pledges from nearly seventy percent of the primary election candidates and seventy-three percent in the general election.²⁸ The Alabama and the Columbus citizens’ committees have very detailed pledges; the latter even defines how the phrases “jury trial experience,” “trial experience,” “litigation experience,” “appellate experience,” and “administrative hearing experience” may be used in campaign literature. The Santa Clara bar committee’s pledge simply asks candidates to agree to abide by the bar’s Judicial Election Campaign Code of Ethics, which contains specific guidelines. The New York bar committees all use pledges; Seattle’s pledge is a perfunctory paragraph. Nevada does not use a pledge. Obviously, committees using pledges believe them to be helpful. One of the authors recommends the use of pledges, the other feels the need for more information on how they are used. One major benefit of using pledges is that it presents a benchmark against which the voting public may measure candidate conduct as the campaign progresses; it provides an opportunity to hold candidates’ feet to the fire if they fail to comply. A major criticism cited by opponents of pledges is that they may be perceived as coercive, preventing candidates from campaigning according to their own preferences.

IV. STRENGTHS AND WEAKNESSES OF EACH COMMITTEE TYPE

An inherent strength of any type of campaign oversight committee described here is that if inappropriate judicial campaign conduct occurs, the voters will hear from diverse, respected, knowledgeable, and neutral people. Indeed, the committee’s mere existence is likely to help inhibit improper conduct; and if any does occur, committee members can give the public an informed, detached analysis.

An inherent weakness in these committees is the tendency that people willing to undertake responsibility for such an effort, may tend to have unrealistically high aspirations for what constitutes proper conduct. This weakness can be met

26. Editorial, *A Nicer Election in Judicial Races, No Repeat of 1996’s Tacky Campaign*, BIRMINGHAM NEWS, Nov. 9, 1998, at 6A.

27. However, one supreme court candidate in 2000, Lyn Stuart, let voters know that she had sentenced two convicted murderers to death, that she had a ninety-one percent conviction rate in DUI cases, that she had a twenty year record in fighting crime as both a prosecutor and judge and that “she respects law enforcement.”

28. See Byerley, *supra* note 21, at 319.

by a well-structured appointment process. We recognize that the inherent strength of these committees will, for some people, seem insufficient unless it includes the power to stop improper conduct. However, the existence of such committees is an essential step toward protecting long-standing values that are not merely fundamental but are also crucial to allowing our state courts to continue to render justice—specifically, judicial independence and accountability.

Official committees have the advantage of durability, resources, and the potency that comes with the potential for official sanctions for misconduct. However, those undeniable advantages are outweighed by two factors that are inseparable from the advantages. One is the certainty that official action is limited by requirements of the First Amendment and due process. Unofficial action, of course, also must be procedurally fair, but unofficial action is free of constitutional limits.²⁹ The second advantage of unofficial committees is the greater credibility that comes with a diverse membership in a voluntary body—members who are selected precisely because they are respected and neutral voices.³⁰ In the unofficial context, such members are more likely to be regarded as respected and neutral, rather than as purely political appointees charged with protecting favorites. On balance, we favor unofficial committees for this role.

CONCLUSION

Three recent events, taken together, constitute the strongest possible recommendation for bar associations to initiate campaign conduct committees.

The December 2000 Summit of State Chief Justices recommended that: “Non-governmental monitoring groups should be established to encourage fair and ethical judicial campaigns.”³¹ As a direct result, in March 2001, New York’s Administrative Board of the Courts adopted a new rule that all judicial candidates (lawyers and judges) have the same campaign conduct

29. Even official action is reviewed more favorably if it chooses “the constitutionally preferred cure of more speech.” See *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1345 (N.D. Ga. 2000).

30. In an Ohio Supreme Court election in 2000, the U.S. and Ohio Chambers of Commerce ran what became the most controversial television ads of 2000’s unprecedentedly heated campaigns. A press conference to attack the attack ads was held by the state bar’s president. There is no reason to question that individual’s reputation for integrity, but we note that as a member of a large law firm, he happened to have as partners the then-president of the Trial Lawyers’ Association and a partner who was then a member of the official state election commission, where he was active in trying to have the commission act against those same ads. We believe that media efforts, and discussions aimed at making it unnecessary to “go public,” are likely to be more effective if conducted by a panel of diverse community leaders whose efforts cannot easily be dismissed as those of insiders whose agenda is to protect themselves and their colleagues.

31. *Summit on Improving Judicial Selection, Call To Action*, 34 LOY. L.A. L. REV. 1352, 1356 (2001) [hereinafter *Call To Action*].

responsibilities.³² The Board also formally

endorsed the establishment and maintenance by statewide and local bar associations of judicial election campaign practices committees that, as part of the bar associations' process of evaluating candidates for judicial office, request candidates to provide written commitments that they will campaign in accordance with the requirements of the Code . . . applicable case law and ethics opinions. . . .

Further, the Board urged the chief judge and chief administrative judge to meet with bar representatives. In June 2001, Chief Administrative Judge Jonathan Lippman announced this effort, and by October, when the *New York Law Journal* placed on its front page an article about a meeting of judges and bar officials, several counties had started new committees, joining the existing committees in Erie and Monroe Counties.³³ In one judicial district, each county has a local committee (most were founded recently), and also has a delegate on a district-wide "super-committee" to address problems in district-wide races that cross county lines.

Similarly, in April 2000, Louisiana's Supreme Court named an *Ad Hoc* Committee to Study the Creation of a Judicial Campaign Oversight Committee. Co-chaired by Chief Justice Pascal Calogero and retired Judge Graydon Kitchens, the Committee met with Alabama lawyer Mark White, who had spearheaded the Alabama effort, and held a public hearing. In 2001, the Committee recommended creation of a permanent oversight committee, to "benefit the citizens of Louisiana by: (1) Serving as a resource for judges and judicial candidates; (2) Educating judges and judicial candidates about ethical campaign conduct; and (3) Helping deter unethical judicial campaign conduct."³⁴

In March 2002, the Louisiana Supreme Court established such a committee on the Alabama model.³⁵ And in April 2002, the Mississippi Supreme Court also acted, establishing a committee on the Georgia model.³⁶

Fully recognizing that of course the right course of action varies to fit each jurisdiction, and particularly, that special steps may be needed for statewide elections, we urge the following action regarding the creation and work of

32. See Appendix B, *infra*.

33. John Caher, *Judicial Election Reform Sought in Campaign for Bench: State Joins National Push for Greater Civility*, 226 N.Y. L.J. 1 (2001). The other two counties that already had committees are Monroe (Rochester) and Onondaga. One of the leaders of these new movements is Craig Landy, head of the New York County Lawyers' Association and an active participant at the Summit. The New York State Bar Association, headed by Steven Krane, is spearheading efforts at the county level to establish oversight committees, and will act as a clearinghouse for these efforts. Copies of each bar's basic materials are available from the authors.

34. AD HOC COMM. TO STUDY THE CREATION OF A JUDICIAL CAMPAIGN OVERSIGHT COMM., REPORT TO THE SUPREME COURT OF LOUISIANA 3 (2000). Copies of that report can be obtained from the authors.

35. LA. SUP. CT. R. 35.

36. *In re* Miss. Code of Judicial Conduct, 2002 Miss. LEXIS 124, Canon 5(E), 5(F) and cmt.

judicial campaign oversight committees.

First, while we believe the need for such committees is acute and the contribution that these committees can bring is large, we also believe that, on balance, such committees will be more effective if they are unofficial rather than official. Any committee must be fair and deliberate, but unofficial committees cannot be sued (which sometimes is done for publicity) on constitutional grounds.³⁷ Second, bar associations, as the most naturally interested bodies, should take steps to establish campaign conduct committees. Such steps should be taken as early as possible prior to the commencement of an election year so that the committee will be in place, and able to begin its work, before campaigns (including primaries) begin.

Whether or not a committee is established for statewide elections, state bar associations should, as in New York, serve as central sources for information on the applicable rules of conduct. Similarly, the National Center for State Courts should serve as a central source of information. By compiling and sharing their different experiences in creating judicial campaign oversight committees, bar associations can only be better served in their efforts to further the work of such committees.

Third, such committees must have by-laws describing their functions and membership, and prescribing procedures (including their approach to confidentiality). The National Center for State Courts should serve as a clearinghouse for "best-practice" examples. Finally, a number of factors should be considered when creating committees. As an initial matter, while the initiative to create such committees comes naturally from bar associations, the committee's balance and credibility will be far greater if the committee includes non-lawyers. In the words of the Alabama Supreme Court's order creating such a body, committees should comprise of persons who have reputations in the community for the "utmost integrity," and who are diverse community organization leaders or representatives. There should be at least as many non-lawyer committee members as lawyers, with co-chairs or the members choosing a chair.³⁸

Additionally, given that the purpose of the committee is to encourage

37. Such committees should distinguish themselves from any other unofficial groups that may hold themselves out as "campaign ethics committees," but are parts of groups pursuing substantive agendas, e.g., special interest groups, including the business lobby, organized labor, religious and social policy groups, etc.

38. New Jersey has no judicial elections, but to meet widespread concerns about its judicial selection process—in which, in operation, senators have a veto over nominations from their own district—one senator has established the Morris County Selection Committee to identify and screen candidates for the bench.

That committee has five non-lawyers chosen by the county's two senators, five attorneys chosen by the county bar, and a chair chosen by the committee members. This process has worked very well. See Robert J. Martin, *Reinforcing New Jersey's Bench: Power Tools for Remodeling Senatorial Courtesy and Refinishing Judicial Selection and Retention*, 53 RUTGERS L. REV. 1, 63-69 (2000). In May 2001, the state bar recommended such committees for all counties. NEW JERSEY STATE BAR ASSOC., IMPROVING THE JUDICIAL SELECTION PROCESS 10 (2000).

appropriate conduct in judicial campaigns, the committee should decide whether its mission is limited to advertisements, statements and similar matters, or includes campaign finance practices; and what forms of action it may take. Likewise, the committee or its creators should determine whether it possesses the power to initiate a discussion about what it deems inappropriate action, or only to act upon an external complaint.

Educating candidates and campaign staff would also be beneficial; the National Center for State Courts could serve as a clearinghouse for curricula. In addition to education for candidates and campaign staff, it would be valuable for members to maintain contact with leaders of civic organizations (and in some States, political parties) that may participate in judicial campaigns. Similarly, asking candidates to sign pledges, as many committees do, is recommended by one of the authors, while the other feels the need for more information on how they are used.

“Hotlines” to provide campaign advice exist in several jurisdictions, and were recommended by the 2000 Summit.³⁹ Finally, experience makes clear that during the weeks immediately before an election, it may be necessary to have a “rapid response” panel or executive committee on call to respond to immediate campaign concerns.

In sum, as the other papers presented at this Symposium make abundantly clear, the problems associated with inappropriate statements and conduct during judicial elections are unlikely to abate anytime soon. Bench and bar leaders across the country are being joined by a growing chorus of members of the media and the public in demands that something be done. As an initial step that requires relatively little yet holds great promise, the authors endorse the use of judicial campaign conduct committees as a means of long-term improvement.

39. *Call To Action*, *supra* note 31, at 1355-56.

Table 1: Summary on Judicial Campaign Conduct Committees
(The authors can furnish contact information on committees in each state)

| | Alabama | Florida | Georgia | Michigan | Nevada | New York | Ohio |
|-----------------|---|---|--|---|---|--|--|
| Type | Appointed by supreme court | Official | Official | Mandatory bar | Supreme Court's Official Standing Committee on Judicial Ethics | Bar associations | Official ^a |
| Membership | In 1998, twelve lawyers and non-lawyers; in 2000, twenty-six judges and lawyers | Judicial Ethics Advisory Committee Staff: Senior attorney in State Courts Administration | Special Committee of Judicial Qualification Commission Staff: Director of JQC | Five regional panels, each comprised of five lawyers and non-lawyers Staff: Bar's "regulation counsel" | Twenty-eight members ^b Staff: Executive director is the exec. dir./general counsel of the Constitutional Commission (for judicial discipline) | Committees of lawyers (some also have non-lawyers) | Special panel of judges Staff: Disciplinary Counsel of Sup. Ct. |
| Since | 1998 | 1998 | 1998 | 1998 only | 1997 | 2001 ^c | 1995 |
| Forms of Action | -Outreach to candidates; -Hotline; -Receives complaints; -Can initiate investigations and actions; -Can refer to disciplinary bodies; and -Can make public statements. | -Educates candidates; -Hotline; and -Can refer to disciplinary bodies. | -Receives complaints; -Can initiate investigations and actions; -Can make public statements; and -Can refer to disciplinary bodies. | -Hotline; -Receives complaints; and -Can refer to disciplinary bodies | -Educates; and -Hotline. | Various, for a few long-standing committees; however, most committees are just beginning | -Education (mandatory for candidates); -Hotline; -Receives complaints; ^d -Can make public statements, if "probable cause" has been found; and -Formal disciplinary proceedings (expedited process). |

^a In addition, unofficial citizens' (county) committees were formed in Columbus, Cleveland and Youngstown. Columbus's goes back to 1985. Such committees are recognized by the supreme court rules, which provide for referring to such committees any complaints involving candidates who have voluntarily signed an agreement with such a committee.

^b In the . . . period involving more than 100 separate judicial campaigns, only one formal campaign complaint has arisen from these counties." Richard A. Dove, *Judicial Campaign Conduct: Rules, Education and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1461 (2001).

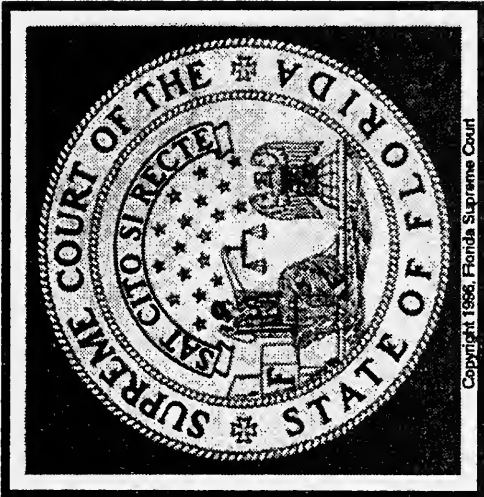
APPENDIX A

FLORIDA JUDICIAL ETHICS CAMPAIGN FORUM



Judicial Ethics

Campaign Forum



Playing by the Rules . . . or else

Welcomes & Introductions

- ◆ Chief judge welcome & introductions.
- ◆ A message from Chief Justice Charles T. Wells.
- ◆ A message from the Florida bar board of governors.

Your Responsibilities

- ◆ Compliance with the Code of Judicial Conduct.
- ◆ Compliance with Florida Statutes.

These are YOUR responsibilities.

Is It Ethical?

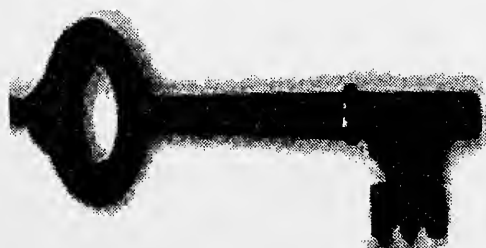
The Common Sense Approach:

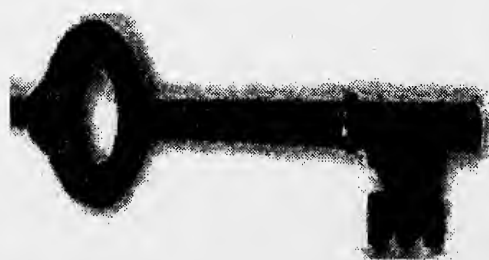
- ◆ Some questions you may want to ask yourself?
 - Would you do it in front of your mother?
 - Will it hurt or harm your reputation?
 - Will the conduct promote public confidence in the integrity and impartiality of the judiciary?
 - How will it appear on the front page of *The Miami Herald* or *El Nuevo Herald*?
 - Does Channel 7 really care about which is your "good side?"

Are Ethics Important?

To be ethical, you have to
be willing to lose.

Otherwise, you will do whatever it takes to win.



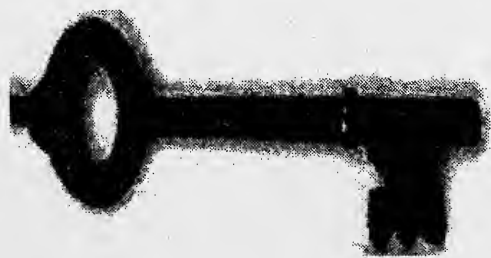


The "Doctrine" of Relative Filth

**"I'm not so bad as long as there
are people who are worse."**

Subtitled:

"Don't look at me!!! Look at her!"



The Code of Judicial Conduct

Canon 7

A Judge or Candidate for Judicial Office Shall Refrain from Inappropriate Political Activity.

[This page is followed by one page of "A judicial candidate shall . . ." then by three pages of "A judicial candidate shall not . . ." and then by another eighteen pages, the last of which is the following page here:]

"Candidates for judicial office should be well aware that they win nothing if they win elections by violating Canon 7. They can and will be disciplined, and the discipline can include removal from office."

Chief Justice Charles T. Wells
Florida Supreme Court
July 1, 2000

For such removal, see *In re McMillan*, 797 So. 2d 560, 2001 Fla. LEXIS 1581,
26 Fla. L. Weekly S 522 (Fla. 2001)

APPENDIX B**RESOLUTION
OF THE
ADMINISTRATIVE BOARD OF THE COURTS***

WHEREAS, the role of the Judiciary is central to the American concepts of justice and the rule of law;

WHEREAS, public trust and confidence in the integrity of the judicial system is critical to the effective functioning of the Judiciary;

WHEREAS, the manner in which campaigns for judicial office are conducted have an important impact on public trust and confidence in the judicial system;

WHEREAS, the Code of Judicial Conduct requires that candidates for judicial office maintain the dignity appropriate to judicial office and act in a manner consistent with the independence and integrity of the Judiciary;

WHEREAS, there is evidence of inappropriate and highly acrimonious campaign conduct and rhetoric in judicial elections in New York State;

WHEREAS, the recent Summit on Improving Judicial Selection, attended by judicial, legislative and bar leaders from the 17 most populous states with judicial elections, identified this trend as posing a substantial threat to public trust and confidence in the integrity of the judicial system;

WHEREAS, the Summit on Improving Judicial Selection issued a *Call to Action* recommending that bar associations addresses [sic] this problem through the establishment of judicial campaign conduct committees;

It is hereby RESOLVED,

THAT the Administrative Board of the Courts endorses the establishment and maintenance by statewide and local bar associations of judicial election campaign practices committees that, as part of the bar associations' process of evaluating candidates for judicial office, request candidates to provide written commitments that they will campaign in accordance with the requirements of the Code of Judicial Conduct, the Code of Professional Responsibility, and applicable case law and ethics opinions; and

THAT the Administrative Board of the Courts urges the Chief Judge and Chief Administrative Judge to meet with representatives of Statewide and local bar associations to discuss the establishment of campaign conduct committees throughout the State.

* Adopted by the Administrative Board of the Courts on March 14, 2001.

JOINT ORDER OF THE APPELLATE DIVISIONS

The Appellate Divisions of the Supreme Court, pursuant to the authority vested in them, do hereby amend, effective immediately, section 1200.44 of the Disciplinary Rules of the Code of Professional Responsibility (Title 22 of the Official Compilations of Codes, Rules, and Regulations of the State of New York), as follows:

§1200.44 [DR8-103] Lawyer Candidate for Judicial Office

[(a)] A lawyer who is a candidate for judicial office shall comply with [the applicable provisions of] section 100.5 of the Chief Administrator's Rules Governing Judicial Conduct (22 NYCRR) and Canon 5 of the Code of Ethical Conduct.

Joseph P. Sullivan

Lawrence J. Bracken

Anthony V. Cardona

Eugene F. Pigott, Jr.

Dated: March 14, 2001

My back-up contact person is:

(Name)

(Address)

(City, State)

(Phone)

(FAX)

I have read the foregoing agreement and Objectives and Procedures and I agree to abide by the terms set forth therein. I have also requested those persons managing my campaign to familiarize themselves with this agreement and to assist in its implementation.

Dated: _____

(Candidate's signature)

(Print name)

JUDICIAL CAMPAIGN CONDUCT COMMITTEES: SOME RESERVATIONS ABOUT AN ELEGANT SOLUTION

STEVEN LUBET*

INTRODUCTION

Barbara Reed and Roy Schotland have provided us with a broad and insightful analysis of state judicial conduct campaign committees.¹ Prior to this excellent survey, even knowledgeable observers of judicial elections would have been unaware of the extent and scope of judicial campaign conduct committees, as well as the variations among them. For that reason alone, Reed and Schotland's Paper performs great service for all who are concerned about judicial ethics.

More important, Reed and Schotland have initiated a discussion regarding an extremely significant aspect of judicial elections. As of this writing, the United States Supreme Court has just granted certiorari in *Republican Party of Minnesota v. Kelly*,² which will be the first case on judicial election conduct to reach the Supreme Court on the merits. Depending upon the outcome of that case, judicial campaign conduct committees may well become the principal means for the implementation, or perhaps even the articulation, of ethical standards in judicial elections.

Reed and Schotland see campaign conduct committees as a creative means of "bridging the gap" between the desire to enforce speech restrictions and the need to respect the First Amendment.³ In their view, a committee's declarative function—"more speech"—can achieve many of the same benefits as formal discipline while avoiding constitutional problems. That is, a committee, upon receiving a complaint, can evaluate a candidate's campaign speech (or advertisements) and, if appropriate, declare it improper or unethical while imposing no further sanctions.⁴ The fear of such a pronouncement would

* Northwestern School of Law. B.A., Northwestern University, 1970; J.D., 1973, University of California at Berkeley. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

2. 247 F.3d 854 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001).

3. Reed & Schotland, *supra* note 1, at 783.

4. As Reed and Schotland point out, the committees do more than simply rule on the appropriateness of campaign speech. Committees perform important educational and mediation function—meeting with candidates to discuss ethics rules (not limited to questions of pure speech) and attempting to resolve disputes when they arise. *Id.* In addition, committee procedures mandate a fair process before any candidate's campaign speech is found inappropriate or unethical. See *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1346 (N.D. Ga. 2000). Moreover, a committee can also

presumably keep candidates in line or, failing that, would alert the public when ethical lines have been crossed.⁵

It might be said that a judicial conduct committee can encourage restraint without imposing constraint. Consequently, the first section of this Paper will briefly develop the normative case in favor of restraining certain speech in judicial elections. Thereafter, Section II will evaluate the posited virtues of judicial campaign conduct committees, raising some misgivings and reservations that were not discussed by Reed and Schotland. Finally, Section III will make several additional suggestions of means to enhance the legitimacy of campaign conduct committees.

I. THE CASE FOR RESTRAINT

The debate over judicial campaign conduct—must it be freewheeling or are there legitimate limits?—can be neatly summarized in a couple of sentences. First, there are those who say something like, “You don’t lose your First Amendment rights simply because you are running for judge.”⁶ The equally emphatic response is “Oh yes you do,”⁷ followed by the necessary explanation of which, and how many, restrictions the First Amendment can tolerate when it comes to judicial campaigns.⁸

In many ways the disagreement is over basic principles, or at least definitions. If the defining property of a judicial campaign is its *electoral nature*, then speech can hardly be limited in any significant way. Democracy demands information, and who can provide it better than the candidates? On the other hand, if the defining property is the *judicial nature* of the office sought, then there would seem to be a compelling public interest in at least those limitations necessary to protect the ultimate value of impartial judging.

For the purpose of this Paper I will assume that the constitutional problem is essentially unresolvable. It is doubtful that any method of reasoning or case analysis can tell us definitively whether—and to what extent—electoral values trump judicial values, or vice versa.⁹ Although the trend in the courts has been

refer a matter to the state disciplinary authority if it believes that further action is necessary. In this Paper, however, I have concentrated on the “declaration-without-more” aspect of the committees’ work, since that unique function holds the greatest promise of resolving the constitutional impasse regarding campaign speech.

5. Reed & Schotland, *supra* note 1, at 783-84.

6. See generally Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735 (2002).

7. See generally Robert O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

8. See generally Stephen Gillers, “If Elected, I Promise [_____]”—What Should Judicial Candidates Be Allowed to Say?, 35 IND. L. REV. 725 (2002).

9. In fact, my view is that certain restrictions on judicial campaign speech are constitutional, for many of the same reasons that other limitations on judges’ speech are permitted under the First Amendment. See, e.g., Steven Lubet, *Free Speech and Judicial Neutrality: A Reply to Monroe*

to expand the permissible scope of campaign speech, no court has been willing to jettison entirely the idea that judicial elections may be treated differently from other elections. Moreover, Professor O'Neil argues persuasively that the courts have seriously undervalued the arguments in support of restricted campaign speech,¹⁰ so there is surely a possibility that the trend eventually will be arrested or reversed.¹¹

While the constitutional outcome regarding this question is debatable, the normative principle seems far less controversial. Both the public and the judiciary are better served when judicial campaigns are clean and honest, and most especially when the candidates refrain from committing themselves to future rulings. There is simply no good argument in favor of turning judicial elections into referenda on specific outcomes. While a certain amount of precommitment or "signaling" may be unavoidable—and uncontrollable—in hard fought campaigns, there is every reason to attempt to prevent or discourage it through all constitutional means.

For this reason, it is unfortunate that the proponents of unconstrained campaign speech sometimes tend to minimize the dangers inherent in conducting judicial elections without regard to judicial ethics. For example, Erwin Chemerinsky makes a powerful case for First Amendment protection, but in doing so he discounts the possibility that judges who have made campaign promises "will be likely to decide the issue as they have promised."¹² Instead, he "imagine[s] that judges who made a promise in their campaign might try to 'bend over backwards' to show that they are fair and not simply following their prior speech."¹³

Even assuming that Chemerinsky's estimation is correct—though it hardly seems that a judge cognizant of the need to run for reelection would actually glory in a public flipflop—the fact remains that the promise in his scenario has quite evidently influenced the judge's eventual ruling. Whether the judge adheres to her commitment or "bends over backwards" to reverse it, it still

Freedman, 37 COURT REV. 6 (2001); Steven Lubet, *Judicial Conduct: Speech and Consequences*, 4 LONG TERM VIEW 71 (1997); Steven Lubet, *On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings*, 37 COURT REV. 4 (2000).

10. See generally O'Neil, *supra* note 7.

11. The certiorari grant in *Republican Party of Minnesota* was limited to Minnesota's so-called "announce clause," which prohibits judicial candidates from announcing their views on "disputed legal and political issues." That clause has been seriously limited in many states, however, in keeping with the 1990 revisions to the Model Code of Judicial Conduct, which now prohibits only "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . . ." MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990). Moreover, the related rule against making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," as adopted in most states, is not under review in *Republican Party of Minnesota*. *Id.* at Canon 5A(3)(d)(i).

12. Chemerinsky, *supra* note 6, at 744.

13. *Id.*

appears that the case has been strategically decided in the shadow of the promise, rather than on the unaffected basis of facts and law. Either way, objective judging has been betrayed. Once on the bench, we hope that judges will completely ignore their campaigns, but Chemerinsky's scenario demonstrates just how difficult, or even impossible, that is in an environment that allows campaign promises.

Chemerinsky further notes that "[a]ll judges come on to the bench with views" about important issues, to which they will likely adhere even if they have not been expressed during the electoral campaign.¹⁴ Since judging is inevitably influenced by the candidates' preexisting opinions, whether or not publicly stated, campaign restrictions cannot possibly result in better or more impartial judging. If true, that would be an argument in favor of abandoning not only mandatory restrictions, but even purely aspirational provisions or precatory rules as well. In fact, campaign promises would have to be encouraged so that the public would be as informed as possible about the candidates' determinative views.

But all views are not alike, in either origin or intensity, and Chemerinsky's analysis therefore conflates two very different phenomena. All judges, no doubt, come to the bench with a few relatively settled ideas about major legal issues, and these are unlikely to be enhanced (or diminished) by announcement during the campaign.¹⁵ Alas, other "views," or more accurately, "stances," may be developed for the very purpose of the campaign. That is, the candidate may have no entrenched opinion about a particular matter, but she will be motivated to take a particular position in order to be elected. Such situations are often created when interest groups press candidates for answers to questionnaires, or even for outright commitments during the campaign. There would be nothing untoward about this in a campaign for legislative or executive office; politicians take positions in order to get elected and strive to fulfill them afterward. But in a judicial election, where the promises relate to specific cases, it is antithetical to the very premise of judging.

In other words, the pressure to make campaign promises may result in the multiplication of "opinions," far beyond the judicial candidates' previously settled ideas. For example, one recent state supreme court election was contested over an extraordinarily complex legal technicality—state court jurisdiction over federally reserved in-stream water flows—about which it is extremely unlikely that any candidate would have had a long-held opinion.¹⁶ The election saw extensive interest-group demands for pledges to reverse an unpopular decision, thus making the situation completely different from Chemerinsky's paradigm of the sincerely-held preexisting belief.¹⁷

14. *Id.*

15. Gillers, *supra* note 8, at 729.

16. See generally John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217 (2001).

17. Chemerinsky also conflates prior judicial opinions with campaign promises, asking rhetorically if it undermines impartiality "[i]f the judge has written a judicial opinion expressing

Simply stated, judicial campaign promises are bad, bad, bad. They have a corrupting influence on the judicial system itself, and they tend to undermine the basic guarantee of due process—that cases will be decided in court on the basis of individual merit, rather than at the ballot box.

Recognizing that the First Amendment may protect many categories of “bad speech,” it is undeniable that enforceable prohibitions against campaign promises—whether merely signaled or stated outright—face a steep constitutional hurdle. In that light, campaign conduct committees, armed with the power to declare “misconduct” but refraining from any other enforcement, offer a tempting solution. Can such committees effectively regulate judicial campaign conduct while avoiding First Amendment prohibitions?

II. ELEGANT SOLUTIONS

As described by Barbara Reed and Roy Schotland, campaign conduct committees offer a truly elegant solution to the problem of objectionable judicial campaign speech—more speech.¹⁸ While the form and composition of such committees varies, their hallmark, for present purposes,¹⁹ is that they confine their effort to the declaration of misconduct. Thus, no actual discipline would be imposed upon a judicial candidate who violated the relevant ethics provisions, apart from the consequence of having her campaign activities declared unethical.

No penalty means no constitutional concerns, particularly if the committee is of the “unofficial” variety.²⁰ Undesirable conduct is deterred, campaigns are cleaner; neutrality is uncompromised; the Constitution is unviolated. Voilà!

All elegant solutions come with drawbacks, however, and judicial campaign conduct committees are no exception. In the case of judicial campaign conduct committees—official, quasi-official, or unofficial—there are substantial, and interconnected, concerns.

First, the committees may have a far greater impact on protected speech than is immediately apparent. Then again, a committee that fails to deter some speech would quickly become little more than a pointless “scolding commission.”

views on exactly the issue now pending. . . .” Chemerinsky, *supra* note 6, at 745. See also Gillers, *supra* note 8, at 728. The missing distinction, of course, is that judges must write opinions as part of the very process of judging. To the extent that prior opinions attenuate strict impartiality, that is simply a necessary consequence of judging itself. No similar rule of necessity justifies or requires campaign promises.

18. Reed & Schotland, *supra* note 1, at 790.

19. Regarding other commendable committee functions, see *supra* note 4.

20. At least one court has held that the “‘truth declaring’ function” of even an official committee does not create a constitutional problem. *Pestak v. Ohio Elections Comm.*, 926 F.2d 573, 579 (6th Cir. 1991). This conclusion is suspect, however, since the “declaration” could just as easily be seen as an official reprimand, which does implicate the constitution. See *Oberholzer v. Commission on Judicial Performance*, 20 Cal. 4th 371 (1999), in which the California Supreme Court held that “stinger letters” require constitutional protections, even though the letters simply inform judges of declared ethics violations, with no penalties or further consequences.

Finally, the eventual credibility of a committee will be compromised to the extent that it is perceived only as a device for protecting incumbents or establishment-backed candidates.

A. Speech

To be blunt, the purpose of a judicial election conduct committee is to delegitimize certain discourse by imposing an electoral penalty. A committee is only effective to the extent that it discourages certain forms of campaign speech, and that can only happen to the extent that the committee's pronouncements are perceived to have a likely impact on the election itself. Thus, what is sometimes discounted as a simple declaration is actually an attempt to coerce conformity by damaging disfavored candidates at the ballot box.²¹

Interference in election outcomes is potentially a very big stick. In the case of official and quasi-official committees, it is also an instrument of questionable virtue. Government intervention in elections, to the detriment of disfavored candidates, is the sort of activity we generally associate with authoritarian regimes and semi-democracies. In our tradition, the sitting government remains scrupulously neutral in elections. Typically, election officials do not help some candidates and disadvantage others—and it is a scandal when they do. To be sure, those in power inevitably attempt to use incumbency to their advantage, but the official organs of government do not declare that some candidates are honest and others untruthful.

Indeed, it may be that the attempt to prejudice an election *ex ante* is more constitutionally troublesome than the imposition of discipline *ex post*.

Nor can committee proponents easily disclaim this repercussion of the declarative function. The committees, after all, must operate for reasons. As Reed and Schotland point out, one of those reasons is to identify “conduct deemed inappropriate” and then “take the initiative to try to discourage or stop such conduct.”²² One way to discourage candidates is to “present to the public their views of why [such] conduct is inappropriate.”²³

If the task of the committee is merely to educate the erring candidates, then its ethics declaration could be made privately. Conversely, if the goal of the public pronouncement is anything other than to influence voters, then the committee's work is essentially meaningless. Why would a candidate care about a hollow rebuke?

In fact, in considering the advantages of official committees, Reed and Schotland point to the “potency” that comes with an official sanction for

21. Speaking of the “endorsement clause” at issue in *Republican Party of Minnesota v. Kelly*, Judge Beam noted that a speech restriction on judicial candidates would also “curtail[] a party’s ability to endorse the candidate of its choosing” since the “specter of an ethics violation” would likely be damaging in the election. 247 F.3d 854, 895 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001) (Beam, J., dissenting).

22. Reed & Schotland, *supra* note 1, at 783.

23. *Id.* at 784.

misconduct.²⁴ Other considerations aside, this is only an advantage if one concedes that potent official sanctions have a role to play in determining the outcome of democratic elections.

Reed and Schotland are mindful of the constitutional implications inherent—and I think unavoidable—in official committees. Thus, they conclude on balance that unofficial committees are preferable because they avoid “constitutional limits,” and also because of their “greater credibility.”²⁵ But the credibility of an unofficial committee cannot be presumed, to which subject we shall now turn.

B. Credibility

Reed and Schotland posit that campaign conduct committees must be composed of “diverse, respected, knowledgeable, neutral people”²⁶ and that unofficial committees will have an especially “diverse membership” that is “selected precisely because they are respected and neutral voices.”²⁷ The theory is persuasive, but in practice it is highly doubtful that everyone will agree.

In fact, the distinct possibility is that any anointed group of “respected, knowledgeable, neutral people” will be regarded skeptically by insurgent or outsider candidates, if not discounted entirely as an arm of the “establishment.” This is not a trivial concern. Outsider candidates—challenging either incumbents or well-entrenched favorites—are often those who are the most inclined to engage in vigorous, unorthodox campaigns.²⁸ Consequently, they will have good

24. *Id.* at 790.

25. *Id.*

26. *Id.* at 789

27. *Id.* at 790.

28. For example, the plaintiff in *Weaver v. Bonner* was an insurgent candidate running for the Georgia Supreme Court against Justice Leah J. Sears, a highly regarded and widely endorsed incumbent. 114 F. Supp. 2d 1337 (N.D. Ga. 2000). His principal campaign tactic was to attack her prior statements on the death penalty and “same-sex marriage.” *Id.* at 1340. In response to complaints that Weaver’s aggressive advertisements contained “material misrepresentation[s] of fact or law,” the Georgia Judicial Qualifications Commission convened its three-member special investigating committee. *Id.* at 1339-40. Six days before the election, the special committee issued a public statement asserting that Weaver’s advertisements were “unethical, unfair, false, and intentionally deceptive.” *Id.* at 1340. The committee followed its mandated hearing process, allowing the insurgent several opportunities to be heard. That did not satisfy him, however, as he immediately filed a lawsuit in federal district court. In any event, the incumbent handily won the election. *Id.*

The issue in *Republican Party of Minnesota v. Kelly*, involved a perennial candidate for judicial office, also challenging an entrenched incumbent for a position on the state supreme court. 247 F. 3d 854, 859 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001). His strategy was to obtain an unprecedented political party endorsement in an officially non-partisan election. *Id.* In an advisory opinion, the state Office of Lawyer Professional Responsibility informed the candidate that it would enforce the Minnesota canon prohibiting candidates from seeking, accepting, or using political

reason to be concerned about conduct complaints. Campaign conduct committees, however well-intentioned and non-partisan,²⁹ therefore run the risk of being perceived as simply an arm of the establishment, which can be damaging to their credibility.³⁰

This phenomenon was evident in the 2000 election for a position on the Illinois Supreme Court. Although the seat was open,³¹ one of the three major candidates was clearly the favorite of the legal establishment, having lined up a multitude of heavy-duty endorsements.³² A maverick candidate, however, used his considerable personal wealth to run a series of contentious television advertisements that attacked his opponent in personal terms never before seen in an Illinois judicial campaign.³³ Most observers were outraged, and considered the attack ads to be inappropriate and unacceptable in a supreme court election.³⁴

In response to one particularly nasty television spot, the Chicago Bar Association quickly convened its executive committee which, just a few days before the election, issued a public statement denouncing the ad as "misleading and unethical." In an unprecedented move, the bar association withdrew its "qualified" rating for the candidate and publicly branded him "not recommended."³⁵

The Illinois bar leaders were in many ways the equivalent of an unofficial judicial campaign conduct committee, and they surely hoped to be regarded as "respected . . . neutral voices."³⁶ But not everyone saw it that way. The outsider candidate himself responded that he had "no confidence" in the objectivity of the

party endorsements. *Id.* Again, the challenger lost and the incumbent was reelected.

29. As far as I am aware, there is no comprehensive database that records campaign conduct committee actions. Anecdotal evidence suggests that the committees have been at least as likely to criticize incumbents as challengers. If accurate, this would still not vitiate the perception that committees are establishment oriented, especially in situations where they act to the disadvantage of an aggressive outsider. *See, e.g., Weaver*, 114 F. Supp. 2d at 1337 (judicial campaign conduct committee's decision, absent notice or hearing, that non-incumbent candidate's campaign ads were unethical, did not violate the candidate's due process or First Amendment rights).

30. It is worth noting that the *Symposium on Judicial Campaign Conduct and the First Amendment* in which this Paper was presented was co-sponsored by the Conference of Chief Justices, who are incumbents by definition. One doubts that unorthodox or aggressive campaign tactics would be considered problematic by a conference of non-incumbent challengers.

31. It was actually a primary for the Democratic nomination which, in Cook County, was tantamount to the election itself.

32. Full disclosure: I also endorsed this candidate and supported his campaign.

33. Bill Granger, *Judges Show They Know a Little About Politics*, CHI. DAILY HERALD, Mar. 16, 2000, at 15.

34. Steve Warmbir, *Fitzgerald Prevails in Supreme Court Battle*, CHI. DAILY HERALD, Mar. 19, 2000, at 15.

35. *Zwick Stands by His TV Ad*, CHI. TRIB., Mar. 14, 2000, at 3 [hereinafter *Zwick Stands by His TV Ad*].

36. Reed and Schotland, however, clearly call for committees that include nonlawyers. Reed & Schotland, *supra* note 1, at 790.

bar association committee, claiming that it included supporters of his opponent.³⁷ He defended his television ads and refused to withdraw them. At least one local political columnist supported that decision, while ridiculing the bar association's action as "pious" and "wet hen" rhetoric offered in support of the status quo.³⁸ Nonetheless, the maverick candidate was soundly defeated.

The problem, as Justice Harlan once explained in a not-entirely-different context, is that "one man's vulgarity is another's lyric."³⁹ Likewise, one candidate's outrageous, unfair, unethical advertisement is another's innovative, incisive, tough campaign tactic. As with so many issues, where you stand depends on where you sit—and in the case of judicial campaign conduct committees, the greater probability is that they will both stand and sit with the entrenched bar establishment.

Reed and Schotland hope that this perception can be avoided by ensuring that the committees are composed of knowledgeable, neutral people who will merit widespread public trust.⁴⁰ That would work in theory, of course, if such people could be located and agreed upon. In electoral reality, however, one must wonder whether the knowledgeable-yet-neutral person is an illusion.

Why would a knowledgeable person remain neutral in a judicial election? Wouldn't knowledgeable, informed individuals be likely to develop opinions about the candidates, at least in appellate court elections? It is hard to imagine someone expending time and effort on self-education about the judiciary, and then being truly neutral about the outcome of a race.⁴¹ And even if the members

37. In addition, he called the committee "unprofessional and appalling," and his spokesman called it "a joke." *Zwick Stands by His TV Ad*, *supra* note 35. See also Steve Warmbir, *Justice Candidate Loses Rating as "Qualified" Over Negative Ad*, CHI. DAILY HERALD, Mar. 11, 2000, at 7.

38. Granger, *supra* note 33.

39. *Cohen v. California*, 403 U.S. 15, 25 (1971) (noting that the statement "fuck the draft" was constitutionally protected).

40. Reed & Schotland, *supra* note 1, at 790.

41. Reed and Schotland take sharp issue with this point, insisting to me that it is unfair to many people, such as active members of the League of Women Voters, who "spend their careers . . . doing all they can to be both knowledgeable and neutral" because they believe "the community needs some people who look beyond who wins each particular election." Email from Roy A. Schotland to author (Jan. 17, 2002) (on file with author). I am not sufficiently familiar with the League of Women Voters to know whether individual League activists are truly neutral, though I do know, of course, that the organization itself is nonpartisan. More broadly, however, it seems to me that most efforts at professional neutrality have been greeted with widespread skepticism. For example, the Federal Election Commission is often accused of partisanship (when it isn't accused of fecklessness). More pointedly, the 2000 election in Florida resulted in charges of favoritism against nearly all of the professional judges, including those with life tenure, who ventured opinions in the *Bush v. Gore* controversy. See generally 531 U.S. 98 (2000). For criticism of the Florida Supreme Court, see RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); for criticism of the United States Supreme Court, see JACK RAKOVE, *THE UNFINISHED ELECTION OF 2000* (2001). It is conceivable, of course, that a

of the committee are determinedly dedicated to neutrality, they would still have to convince the public and the targeted candidates. Suspicion in these circumstances is no doubt inevitable, and may sometimes be justified. On at least three occasions I have been consulted by targeted candidates who were concerned that a state judicial conduct commission included contributors and supporters of the candidate's opponents.

III. THE SEARCH FOR LEGITIMACY

If judicial campaign conduct committees are to play the elegant role proposed by Reed and Schotland, they must above all else be seen as legitimate in their communities. The quest for knowledgeable, neutral members is neither self-fulfilling, nor will it necessarily be self-evident.

The absolute starting point is that every committee must be nonpartisan (or pan-partisan), multi-professional, and expansively inclusive. As Reed and Schotland make clear, it surely will not do for a committee to be composed exclusively of lawyers, or of lawyers and judges. The participation of sitting judges might be questioned pursuant to Rule 4C of the Model Code of Judicial Conduct, which prohibits judges from testifying at public hearings or accepting appointments to commissions concerning matters other than "improvement[s] of the law, the legal system or the administration of justice."⁴² In any event, the involvement of judges would have the drawback of seeming to politicize the judiciary, as well as appearing to invest the committee with a pro-incumbent bias.⁴³

Lawyers are understood to have the greatest stake in judicial elections, but that also makes them the people most interested (read: non-neutral) in the outcome. Thus, even though lawyers are presumptively the most knowledgeable about the issues and standards in a judicial election, their opinions are also likely to be the most suspect.

For the same reason, the nonlawyer members of a committee should not be drawn from the usual ranks of business leaders. Instead, committee membership should be extended in nontraditional directions to include civic activists, school teachers, community organizers, small business owners, and, shall we say, ordinary people. The risk is that a broadly constituted committee will find it difficult to reach consensus, thereby precluding definitive action in all but the most unequivocally egregious cases. Then again, it is in precisely such cases that a persuasive and unified committee voice is the most needed.

Most important, however, is the manner in which a judicial campaign conduct committee defines its warrant. The 1990 Model Code of Judicial Conduct contains three general restrictions on campaign speech. Under Rule 5A(3)(d), a judge or judicial candidate may not "[M]ake pledges or promises of

judicial conduct committee could be composed of individuals whose neutrality is beyond question, but the task is daunting.

42. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(1) and (2) cmt. (1990).

43. See Reed & Schotland, *supra* note 1, at 789-90.

conduct in office other than the faithful and impartial performance of the duties of the office”;⁴⁴ “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court”;⁴⁵ or “knowingly misrepresent the identity, qualifications, present position or any other fact concerning the candidate or any opponent.”⁴⁶

Even in the absence of constitutional objections, as in the case of an unofficial committee, only the first provision ought to be the subject of campaign conduct committee intervention.

As discussed at the outset of this Paper, the greatest harm to the judiciary is occasioned by campaign promises that commit candidates to certain outcomes. “Pledges and promises” are more clearly unethical and more dangerous to guarantees of due process, thus creating a greater need for intervention.

In contrast, the second prohibition is vague and ambiguous, and it is therefore unlikely to lead to a credible committee pronouncement. To be sure, one aspect of the rule simply restates the rule against pledges and promises, by banning “statements that commit or appear to commit the candidate with respect to cases . . . likely to come before the court.”⁴⁷ But the provision also applies “controversies or issues.”⁴⁸ It would be nothing less than a quagmire for a campaign conduct committee to condemn a statement that commits, or for that matter “appears to commit,” a candidate with respect to a mere “issue.”

For better or worse, judicial elections are contested over issues. A campaign conduct committee would risk undermining its moral authority, and all of its other pronouncements, should it attempt to drive issue discussions out of a campaign.

Finally, the matter of misrepresentations—as delineated in the third provision—ought to be left to the candidates themselves. Political campaigns are made up of charges and countercharges, and they are correctable through the ordinary processes of political debate. If a judicial candidate has been smeared or defamed, she can simply respond to the insult. Then the voters will choose. That is why they call it an election.

In sum, judicial campaign conduct committees can do their best work by exposing the unethical nature of “pledges or promises of conduct in office”⁴⁹ or commitments “with respect to cases.”⁵⁰ Not only are such promises harmful to

44. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990).

45. *Id.* at Canon 5A(3)(d)(ii). The 1972 Model Code contained a broader version of this prohibition, providing that a candidate may not “announce his views on disputed legal or political issues.” MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972). This provision—sometimes called the “announce” clause—has been held unconstitutional by several courts, and it is currently pending before the U.S. Supreme Court in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2000), *cert. granted*, 122 S. Ct. 643 (2001).

46. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990).

47. *Id.*

48. *Id.*

49. *Id.* at Canon 5A(3)(d)(i).

50. *Id.* at Canon 5A(3)(d)(iii).

the judicial process, but they also tend to have a multiplier effect, as one candidate's promise may lead to an opponent's promise in response. The candidates (or their supporters) cannot be relied upon to remedy this one-way ratchet. Thus, the intervention of an ethics committee can be most helpful in breaking or forestalling a cycle of unethical promises.

PUBLIC FUNDS AND THE REGULATION OF JUDICIAL CAMPAIGNS

RICHARD BRIFFAULT*

INTRODUCTION

Recent discussions of judicial election campaigns have been marked by two themes: (i) the growing costs of such campaigns, with concerns over the roles of large contributions and independent spending, the burden of fundraising for candidates, and the implications of campaign finance practices for judicial decision-making; and (ii) the changing nature of campaigning, as elections that were once “low-key affairs, conducted with civility and dignity,”¹ have become increasingly politicized, marked by heated charges and sharp criticisms of the records and decisions of sitting judges. The two developments are surely intertwined, with the more bitter and hard-fought campaigns funded by rapidly growing campaign coffers, and the surge in campaign money, in turn, stimulated by more heated ads and greater attention to hot button issues. Sharply rising costs and more intensive and even ideological campaigning together mark an increased recognition of the significant policy-making role state courts play—a backhanded tribute to the power and discretion of state judges and to the high political stakes in many state judicial elections. Yet the combination of evolving campaign finance practices and more politicized campaigning may call into question the fairness of judicial decision-making and public confidence in the impartiality of the courts.

The changing nature of judicial campaigns is reflected in, and has been bolstered by, recent federal and state court decisions subjecting traditional state judicial campaign codes to First Amendment scrutiny. Several courts have held that code provisions that preclude candidates from “announc[ing]” their “views on disputed legal or political issues” infringe on the free speech rights of campaign participants and on the interest of voters in receiving information relevant to the election.² These courts either have held such content restrictions

* Joseph P. Chamberlain Professor of Legislation; Director of the Legislative Drafting Research Fund; Vice Dean Columbia Law School. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995), *quoted in* David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1372 (2001).

2. These provisions may be traced to the Canons of Judicial Ethics adopted by the American Bar Association in 1924 and the Model Code of Judicial Conduct adopted by the ABA in 1972. *See e.g.*, *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 864-67 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001) (providing history of restrictions on campaign conduct of judicial candidates in Minnesota). *See generally* Randall T. Shepard, *Campaign Speech: Restraint and*

invalid³ or have sustained them by interpreting the restrictions narrowly to preclude a candidate only from making known her positions on issues "likely to come before" her as a judge.⁴ Judge Posner has suggested that even the "likely to come before" standard is overbroad, and that only a prohibition on pledges or promises to rule a certain way would pass constitutional muster.⁵

A second set of cases has dealt with what might be called the tone of judicial campaigning. In an effort to promote campaign civility, a number of states forbid judicial candidates from making false, misleading or deceptive statements.⁶ Several courts have recently held that these provisions are overbroad and unduly constrain judicial campaign speech. They have either invalidated the provisions,⁷ or saved them by narrowing them to apply only to statements that are either intentionally false or issued with reckless disregard as to their truth or falsity.⁸

One solution for the rising costs of judicial elections is public funding.⁹ Public funding could reduce or eliminate the burdens of fundraising, judicial candidates' dependence on private donors, and the concomitant concern that such contributions affect judicial decision-making.¹⁰ The National Summit on Improving Judicial Selection recently recommended public funding as one of a

Liberty in Judicial Ethics, 9 GEO. J. LEGAL ETHICS 1059, 1063-66 (1996).

3. See, e.g., *Buckley v. Ill. Jud. Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993); *Beshear v. Butt*, 773 F. Supp. 1229 (E.D. Ark. 1991); *ACLU of Fla., Inc. v. Fla. Bar*, 744 F. Supp. 1094 (N.D. Fl. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991).

4. See, e.g., *Republican Party of Minn.*, 247 F.3d at 861; *Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa.*, 944 F.2d 137 (3d Cir. 1991). See also *Ackerson v. Ky. Jud. Retirement & Removal Comm'n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (affirming code precluding taking positions on issues "likely to come before the court"); *Deters v. Jud. Retirement & Removal Comm'n*, 873 S.W.2d 200, 205 (Ky. 1994) (same). The constitutional standard is similar to the 1990 version of the ABA Model Code of Judicial Conduct, which precludes a judicial candidate from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

5. *Buckley*, 997 F.2d at 229 ("there is almost no legal or political issue that is unlikely to come before the judge of an American court").

6. See Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1448-49 (2001).

7. See, e.g., *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000); *Butler v. Ala. Jud. Inquiry Comm'n*, 111 F. Supp. 2d 1224 (M.D. Ala. 2000).

8. *In re Chmura*, 608 N.W.2d 31 (Mich. 2000). Some courts, however, vigorously enforce rules against misleading or deceptive statements. See, e.g., *In re Jud. Campaign Complaint Against Hein*, 706 N.E.2d 34 (Ohio 1999); *In re Jud. Campaign Complaint Against Burick*, 705 N.E.2d 422 (Ohio 1999).

9. See, e.g., AMERICAN BAR ASS'N, STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001); Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467 (2001).

10. See Geyh, *supra* note 9, at 1468-71.

number of steps for reforming judicial elections.¹¹

Could public funding also be used to regulate the content of judicial campaigns? Specifically, could a state require, as a condition for the provision of public funds to a judicial candidate, that the candidate agree to adhere to a code of campaign speech broader and more restrictive than one that could be constitutionally imposed on the candidate?

The U.S. Supreme Court has held that although a mandatory limit on the amount of money a candidate can spend in his election campaign is unconstitutional, a grant of public campaign funds to a candidate may be conditioned on the candidate's agreement to limit total campaign expenditures.¹² Arguably, if public funding can be conditioned on a waiver of the constitutional right to engage in unlimited spending, it might also be conditioned on a waiver of the right to engage in certain types of constitutionally protected speech, such as taking positions on political and legal issues or making statements that may be misleading or deceptive.

Part I of this Paper considers whether public funding for a judicial candidate can be made contingent on the candidate's adherence to an otherwise unconstitutional campaign speech code.¹³ It first examines the case law concerning the restrictions on campaign spending currently attached to various federal and state public programs, and considers the implications of the constitutionality of the spending limit condition for a speech code condition on public funding. It then turns to the unconstitutional conditions doctrine, which shapes the ability of government to impose conditions on public grants. Under the doctrine, although government may use public funds to promote some activities and not others, it cannot condition the availability of public benefits on the waiver of fundamental rights. As I will indicate, the doctrine is a murky one, and provides no clear answer to the question of whether a campaign speech code could be an unconstitutional condition. Part I concludes by assessing the significance of some of the distinctive features of a judicial candidate speech code—including the impact on the extent of campaign speech, the arguably

11. *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L. A. L. REV. 1353, 1358 (2001) [hereinafter *Call to Action*] (recommendation sixteen: "States in which candidates compete for judicial positions should consider adopting public funding for at least some judicial elections.").

12. See *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976). *Accord* *Republican Nat'l Comm. v. FEC*, 445 U.S. 955 (1980), *aff'g*, 487 F. Supp. 280 (S.D.N.Y. 1980).

13. This Paper does not directly address the question of whether campaign codes that limit judicial candidates' statements on political and legal issues or that preclude "misleading" or "deceptive" or intentionally false statements are unconstitutional. This Paper considers whether campaign speech restrictions that might be unconstitutional could be enforced as conditions attached to a voluntary public funding system. For that purpose, I assume without deciding that some judicial campaign speech constraints are unconstitutional. Indeed, the very reason to consider whether campaign restrictions can be tied to public funding is that the speech restrictions would be unconstitutional, otherwise the restrictions could be imposed directly and would not need to be made a condition of public funding.

distinctive nature of judicial campaigns, and the fact that such a code would be applied only to candidates and not to independent committees—in the determination of the constitutionality of a speech code condition for public funding.

There is no clear answer to the question of whether a campaign speech code could be made a condition of judicial candidate public funding. Although the code would be voluntary in the sense that a candidate would be free to decline the public grant and thereby avoid the speech restriction, the voluntariness of the program may not be enough to save the condition. Such a condition could not be justified in terms of the traditional goals of public funding, such as reducing fundraising burdens, mitigating the potential corrupting effects of contributions, and facilitating candidate communications with the electorate. Rather, the conditions would change the content of campaign statements. The powerful First Amendment interest in unconstrained discussion of political issues and the important role candidate statements play in informing voters—the very factors which have contributed to the growing judicial hostility to traditional judicial campaign codes—might very well lead a court to conclude that making adherence to a restrictive code a prerequisite for the receipt of campaign funds is unconstitutional.

On the other hand, it could be argued that campaign speech codes promote the due process value of judicial impartiality.¹⁴ By reducing the opportunities for judicial candidates to commit themselves on specific issues or make misleading statements, a campaign speech code may increase both the likelihood the parties who appear before elected judges receive impartial justice and the public's confidence in the courts. Although *mandatory* restrictions on judicial candidate statements might violate the First Amendment's proscription of content-based regulation of political speech, the combination of voluntary restrictions and a substantial public interest in assuring the fairness—and the appearance of fairness—of the courts might be enough to save an otherwise unconstitutional speech code.

The operating assumption of this Paper is that the question of the constitutionality of judicial candidate speech codes may be separated from the constitutionality of a speech condition for public funding, but in the end the two issues are closely intertwined. The free speech and due process concerns that frame the debate over whether speech codes are constitutional are also likely to be central to the determination of the constitutionality of a speech code condition on campaign funds—although the weighing and balancing of free speech and due process concerns might come out differently in the context of a voluntarily accepted condition for a public grant.

Part II then briefly considers other mechanisms for using public funds to improve judicial campaigns. Several jurisdictions that provide public funds to candidates for executive or legislative office require candidates who accept such funds to also participate in public debates. There is some argument that in

14. Indiana Chief Justice Shepard has argued that judicial campaign speech constraints are justified by the due process interest in an impartial judiciary.

debates candidates generally seek to present themselves positively and to avoid the negative campaigning often characteristic of sound-bite ads. Debates, thus, might improve the tone of judicial election campaigns. A debate requirement almost certainly passes constitutional muster, although there are no cases on point. Similarly, a number of jurisdictions provide candidates with the opportunity to place a statement in a government-funded voter pamphlet or voter guide. The state could most likely require that a judicial candidate's statement in a voter pamphlet abide by certain content restrictions. Access to debates and voter pamphlets could not be used to directly regulate the content of judicial campaigning generally, but states may be able to use debate requirements and voter pamphlet rules to affect the tenor of judicial campaigns.

I. PUBLIC FUNDING AND A CAMPAIGN SPEECH CODE

A. *Public Funding and the Spending Limit Condition*

In *Buckley v. Valeo*,¹⁵ the Supreme Court held that limits on campaign spending burden freedom of speech,¹⁶ must be subject to strict judicial scrutiny,¹⁷ and, to be constitutional, must be narrowly tailored to promote a compelling government interest.¹⁸ The Court held that neither limiting the amount of money spent on campaigns nor equalizing the financial resources available to candidates is a compelling government interest.¹⁹ The Court found that the only compelling interest that might support spending limitations was "the danger of candidate dependence on large contributions," but the Court found that the interest "in alleviating the corrupting influence of large contributions"²⁰ was served by contribution limits and reporting and disclosure requirements. Thus, a limit on candidate spending could not be justified by the interests in preventing corruption and the appearance of corruption.²¹

In a footnote to its invalidation of the spending limit, however, *Buckley* referred to another section of the opinion that considered the new federal program of providing public funds to presidential candidates. The Court stated briefly that when Congress engages in the public financing of election campaigns, it "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding."²²

The portion of *Buckley* concerned with the presidential public funding

15. 424 U.S. 1 (1976).

16. *Id.* at 19-23.

17. *Id.* at 25.

18. *Id.*

19. *Id.* at 16-17.

20. *Id.* at 56.

21. *Id.* at 55-57.

22. *Id.* at 57 n.65.

system did not directly consider the constitutionality of the spending limit condition. Rather, it dealt with such questions as Congress' authority under the General Welfare Clause to adopt public funding and the equal protection issues raised by the law's differential treatment of major party, minor party, and new party candidates, and by the formula used to fund presidential primary candidates. The Court specifically found that public funding was a valid exercise of Congress' authority "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."²³ The Court did note in passing that "one eligibility requirement for matching funds is acceptance of an expenditure ceiling."²⁴ Apart from the aforementioned footnote in the section of the opinion addressing the constitutionality of spending restrictions generally, *Buckley* did not consider the constitutional question presented by the spending limit condition on public funding.

Four years later, the Supreme Court affirmed without opinion a lower court decision which expressly considered and rejected a challenge to the public funding spending limit condition. In *Republican National Committee (RNC) v. FEC*,²⁵ the three-judge court took its cue from the *Buckley* footnote's reference to the voluntariness of the spending limit and framed the issue in terms of whether a candidate "is somehow or other forced as a practical matter to accept public funding [with the spending limit] in lieu of unlimited private funding and spending."²⁶ Noting that candidates could decline public funding and rely on private funds, and that privately funded campaigns could be successful, the court rejected the argument that candidates were coerced into accepting public funding with its attendant spending limit.²⁷ It then considered whether a spending limitation was an unconstitutional condition on a candidate's voluntary acceptance of public funding.²⁸ As "Congress may not condition a benefit on the sacrifice of protected rights,"²⁹ the court looked to whether the spending limitation burdened a protected right and whether, if so, the burden was justified by a compelling state interest.³⁰

The *RNC* court doubted whether public funding with a spending limit burdened any protected right as the law simply provided "an additional funding alternative" to the traditional system of private funding without limits: "Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will enhance the candidate's powers of communication and association."³¹ Nevertheless, the court

23. *Id.* at 91.

24. *Id.* at 107-08.

25. 487 F. Supp. 280 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

26. *Id.* at 283.

27. *Id.* at 283-84.

28. *Id.* at 284.

29. *Id.*

30. *Id.* at 283-85.

31. *Id.* at 285.

also found that even if it assumed that the limit burdened the candidate's First Amendment rights, the limit could be justified as necessary to effectuate compelling governmental interests. Quoting *Buckley's* description of the goals of public funding—reducing the influence of large contributions on the political process, facilitating candidate communication, and freeing candidates from the burdens of fundraising—*RNC* found “the statutory scheme is supported by a compelling state interest.”³² Without a spending limit, “the candidates would no longer be relieved of the burdens of soliciting private contributions and of avoiding unhealthy obligations to private contributors.”³³ The spending limit was, thus, needed to secure public funding and the interests public funding promotes.

Subsequent lower court cases considering conditions attached to public funding programs have continued to focus on *RNC's* concerns with voluntariness and the closeness of the connection between the condition and the goals to the public funding program. These cases may be of limited relevance to assessing the constitutionality of a campaign speech constraint attached to public funding since the cases involve conditions that were really incentives to participate in public funding. These conditions arguably burdened *other* candidates and independent committees, not the recipients of public funding. But the analysis may suggest some of the questions a campaign speech code condition will face.

In *Vote Choice, Inc. v. DiStefano*,³⁴ the First Circuit upheld the provision of Rhode Island's public funding law that permitted individual donors to partially public funded (and spending-limited) candidates to contribute up to twice the amount donors were allowed to give to candidates who did not participate in the public funding program. The court reasoned that the state “need not be completely neutral on the matter of public funding of elections” but may, instead, give incentives to participate in public funding because of public funding's role in freeing candidates from the pressures of fundraising and ameliorating the risk of corruption.³⁵ The court concluded that the “contribution cap gap” did not create “profound” disparities between public and private funding, and that the different contribution limits appropriately reflected the fact that public funding with spending limits reduced the danger that a large private contribution would have a corrupting effect.³⁶

The First, Sixth, and Eighth Circuits have all considered state public funding laws that waive the expenditure limit for a publicly funded candidate and/or

32. *Id.*

33. *Id.* The court also found that the spending limit, and the limits on private contributions to candidates, did not abridge the rights of supporters. Supporters remained free to engage in uncoordinated expenditures on behalf of their candidates, as well as to provide certain unrestricted voluntary activities. *Id.* at 286-87.

34. 4 F.3d 26 (1st Cir. 1993).

35. *Id.* at 39.

36. *Id.* at 39-40. *But cf.* *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (invalidating Kentucky law permitting publicly funded candidates to accept donations five times as large as those made to privately funded candidates).

provide the candidate with additional public funds when the publicly funded candidate is faced with either (i) an opponent who has not accepted public funding and spends over a threshold amount or (ii) an independent committee that spends more than a threshold amount against the publicly funded candidate or in favor of her opponent.³⁷ These courts have focused on whether the spending limit waiver and/or additional funds unduly coerce candidates' decisions to participate in public funding,³⁸ and whether the conditions are narrowly tailored to promote the goals of the public funding program.³⁹ In three cases, the conditions were found to be consistent with voluntariness and to be necessary or narrowly tailored to advance the public funding program (and thus to promote the anti-corruption and fundraising burden reduction goals of public funding). The spending limit waiver and provision of additional funds to respond to high spending opponents and independent committees were legitimate efforts to avert "a powerful disincentive for participation in [a] public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit."⁴⁰ On the other hand, one Eighth Circuit panel found

37. See *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (limit waived and more public funds provided based on either opponent or independent spending); *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998) (limit spending by nonparticipating waived and more public funds provided based on opponent spending); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550-55 (8th Cir. 1996) (limit waived based on opponent). But cf. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (invalidating provision of additional funds to respond to independent spending).

38. See *Rosenstiel*, 101 F.3d at 1550-51, 1555 (spending limit waiver an inducement, not coercive); *Gable*, 142 F.3d at 947-49 (spending limit waiver plus additional public funds provide a "very strong incentive to participate" but are not coercive); *Daggett*, 205 F.3d at 466 (incentives not coercive where there is a "rough proportionality" between benefits and burdens of participation).

39. Compare *Rosenstiel*, 101 F.3d at 1553-54 (spending limit waiver is narrowly tailored to promote the compelling interests advanced by public funding), with *Day*, 34 F.3d at 1359-62 (provision of additional funds to candidates targeted by independent spending not narrowly tailored to promote goals of public funding).

40. *Rosenstiel*, 101 F.3d at 1551. Accord *Daggett*, 205 F.3d at 469 ("candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent"); *Wilkinson*, 876 F. Supp. at 926-28. Indeed, the Sixth Circuit went so far as to uphold a Kentucky provision that prohibits all gubernatorial candidates from accepting contributions within the twenty-eight days immediately preceding an election. This was held to be justified by Kentucky's interest in effectuating its law providing publicly funded gubernatorial candidates additional funds when faced with an opponent who receives contributions over the threshold amount. The twenty-eight-day window was necessary so that the state could receive campaign finance reports and provide publicly funded candidates with the additional funding in time for the election. *Gable*, 142 F.3d at 949-51. The court, however, struck down the portion of the law barring candidates from contributing their own funds to their campaigns during the twenty-eight-day window. That limit was found inconsistent with *Buckley's* affirmation of a candidate's right to contribute his own funds without limit. See *id.* at 951-53.

unconstitutional an amendment to Minnesota's public funding law that allowed additional grants to publicly funded candidates targeted by independent expenditures because it was not necessary to promote participation in the public funding system. Prior to the provision's enactment nearly all candidates participated in the public funding program so the provision could not be justified as narrowly tailored to advancing the goals of public funding.⁴¹

B. Implications from the Public Funding Cases for Restrictions on Campaign Speech

The public funding spending limit cases reflect two concerns: (i) that a candidate's acceptance of public funding and its conditions not be coerced, and (ii) that conditions burdening speech be narrowly tailored to promote participation in the public funding system, and, thus, promote public funding's underlying goals.

1. *Voluntariness*.—A court is unlikely to find that the addition of a campaign speech constraint undermines the voluntariness of a candidate's decision to participate in a public funding program. Indeed, by making the public funding program more burdensome and potentially less attractive to candidates, a campaign speech condition would confirm that a candidate's decision to opt for public funding is voluntary. If the only factor were voluntariness, then a speech restriction condition would surely survive constitutional challenge.

Buckley's only statement concerning the spending limit indicates that voluntariness is critical, but that statement occurs in a footnote, involved minimal analysis, and is arguably dictum.⁴² Voluntariness is central, but it is not clear

41. *Day*, 34 F.3d at 1360-62 (public funding system enjoyed nearly 100% participation before provision for matching independent spending was enacted). *Day* focused on the burden the provision of public funds to match independent spending places on the speech of independent spenders: "To the extent that a candidate's campaign is enhanced . . . , the political speech of the individual or group who made the independent expenditure 'against' her (or in favor of her opponent) is impaired." *Id.* at 1360. It was this burden that could not be justified as narrowly tailored to promote the goals of the public funding system. In a case involving a similar provision in Maine's "clean elections" system, however, the First Circuit rejected the idea that providing additional dollars to respond to independent spending burdens the speech of independent spenders: "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." *Daggett*, 205 F.3d at 465. Instead, the First Circuit focused simply on whether the availability of additional funds coerced a candidate's choice of whether or not to participate in public funding. The court concluded that the additional matching funds "contributes to any alleged coerciveness in only a minuscule way . . . because it is of such minimal proportion to the other aspects of the system," *id.* at 469, and that it was justified by the state's goals for the public funding system. *Id.* at 470.

42. The three-judge court in *RNC* denied that the *Buckley* footnote was "mere dictum," noting that the Supreme Court relied on the existence of the expenditure limits in rejecting the arguments raised on behalf of minor parties against the presidential public funding system. *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 284 n.6 (S.D.N.Y. 1980). *Buckley* considered

whether voluntariness alone is sufficient.

2. *Narrow Tailoring*.—A second theme is the requirement that conditions attached to public funding promote either participation in the public funding program or public funding's campaign finance goals. The campaign speech condition is unlikely to be found narrowly tailored to promote participation in a public funding program. By constraining campaigning, such a condition is more likely to discourage candidate participation in public funding than to encourage it. Nor can it be said to promote the traditional campaign finance goals of public funding—reducing fundraising burdens and the corrupting effects of contributions and the pursuit of contributions on government decision-making, and facilitating candidate communications with the electorate.

Rather, the purpose of the public funding condition would be to use public funds to secure candidate adherence to a campaign speech code and its underlying goals of more decorous judicial elections and an impartial judiciary. Arguably, like the traditional goals of public funding, these goals are also ultimately addressed to improving the functioning of government and public confidence in government. But they involve direct modification of the content of election statements. Whether a government can use public funds to alter the content of election speech requires greater consideration of the unconstitutional conditions doctrine, which is the subject of the next section.

C. *Campaign Speech Constraints and the Unconstitutional Conditions Doctrine*

An unconstitutional condition issue arises when a government provides a benefit—such as a subsidy or a tax exemption—that it is not constitutionally

the claim that public funding was unconstitutional because *inter alia* it provided major party candidates with more public money than candidates of minor parties (defined as those parties which had received between five and twenty-five percent of the vote in the prior presidential election) and provided no public money at all to candidates of new parties (defined as parties that had received less than five percent of the vote in the prior presidential election). The Court defended the distinction, in part, because as a "fact of American life" only the candidates of the major parties were likely to win the election. 424 U.S. 1, 98 (1976). In addition, the Court cited the spending limit to support its finding that the public funding law did not really burden minor parties. The law applies the same spending limit to major and minor parties who accept public funding even though it gives major parties more money. New party candidates who abide by the spending ceiling and receive more than five percent of the vote qualify for a payment of public funds after the election. The effect would be that for major party candidates public funding substitutes for private money, but for minor party candidates public funding supplements private money. *Id.* at 99. As a result, the differences in the provision of public funds did not harm minor and new parties. It is not clear that the spending limit was essential to the Court's determination that the differences in the availability of public funding are constitutional. Nor did the Court expressly consider the constitutionality of the spending limit in the context of the public funding condition. Nevertheless, the spending limit did play a role in the Court's evaluation of the public funding system and the Court did not doubt its constitutionality.

obligated to offer, but then conditions the availability of the benefit on the recipient's agreement to forego the exercise of a constitutionally protected liberty. Such a condition may be seen as unduly constraining the constitutional right. The government is free to provide or cancel the benefit, and it may choose to subsidize some activities and not other similar ones, even if an activity not subsidized involves a protected right. But the government "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."⁴³

Determining whether conditions attached to a government grant are an appropriate means to assure that public funds are used to promote a legitimate government goal or, instead, constitute an interference with protected rights has never been easy. The unconstitutional conditions doctrine is rife with inconsistencies.⁴⁴ One leading legal scholar once called the area "too hard"⁴⁵ for consistent judicial resolution and another labeled it a "minefield to be traversed gingerly."⁴⁶

In the First Amendment context, the Supreme Court has identified several factors in determining whether a condition attached to a subsidy is merely a permissible element of the definition of the subsidized program or is, instead, an unconstitutional constraint on speech. These include: (i) whether the grant promotes governmental speech or private speech; (ii) whether the condition constitutes viewpoint discrimination; (iii) whether the condition applies to all the grantee's speech or only to speech directly subsidized by the grant; and (iv) whether the grant condition may be said to distort a medium of expression.

1. *Governmental or Private Speech.*—The Court has looked to whether a subsidy involves the government's use of "private speakers to transmit specific information pertaining to its own program," or whether, instead, the government is seeking to facilitate private speech. If the government is making grants to private parties simply to convey a governmental message, "it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."⁴⁷ It can, thus, use the subsidy to "promote its own policies or to advance a particular idea."⁴⁸ But when the subsidy is intended to promote private speech, serious First Amendment concerns are implicated.

This is one aspect of the Supreme Court's explanation of how it reconciled

43. *Legal Servs. Corp. (LSC) v. Velazquez*, 531 U.S. 533, 547 (2001).

44. *Compare LSC*, 531 U.S. at 533 (invalidating restriction on lawyers funded by the Legal Services Corp. which barred them from raising challenges to the validity of existing welfare laws), *with Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding regulation prohibiting doctors who receive federal family planning funds from discussing with patients abortion as a form of family planning).

45. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995).

46. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1416 (1989).

47. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

48. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

the seemingly disparate results in *Rust v. Sullivan*,⁴⁹ which upheld a regulation barring recipients of Title X federal family planning funds from counseling their clients concerning abortion as a method of family planning with *Legal Services Corp. (LSC) v. Velazquez*,⁵⁰ which held unconstitutional a statute prohibiting LSC-funded lawyers who represent indigent clients seeking welfare benefits from challenging the constitutionality of federal or state welfare laws. LSC found that whereas "the counseling activities of the doctors under Title X amounted to governmental speech" with the private doctors in effect carrying out a government program,⁵¹ the LSC-funded lawyer "speaks on behalf of the client in a claim against the government" so that the attorney, not the government, is the speaker.⁵²

In the judicial election context, with many of the candidates challenging incumbent judges and all candidates independently undertaking their own campaigns, the subsidized speech is plainly private, not governmental. Thus, the unconstitutional conditions question cannot be avoided.

2. *Viewpoint Discrimination*.—The Supreme Court has expressed special concern about speech restrictions that may be said to constitute viewpoint discrimination.⁵³ Thus, the condition in LSC did not merely bar the government-funded lawyers from participating in welfare cases. Instead, it prohibited them from raising arguments against the constitutionality of welfare laws and was thus, viewpoint discrimination. Conversely, the Court viewed the regulations in *Rust* as simply making a distinction between the subjects of "family planning" and "abortion," not as suppressing views about abortion.

As LSC and *Rust* indicate, determining whether a restriction constitutes viewpoint discrimination is not always easy. Nevertheless, a speech code condition for public funding would probably not constitute viewpoint discrimination. A ban on announcing one's position on legal and political issues generally would not turn on particular views concerning those issues, but on the fact that a statement has a political or legal content. Similarly, a ban on deceptive and misleading communications does not turn on the candidate's views but on whether they contain a deceptive or misleading statement. On the other hand, given the vagueness of the restrictions—particularly the deceptive or misleading prohibition—there might be some concern that these rules could lend themselves to viewpoint discrimination in their administration and enforcement.

The Supreme Court, however, has not limited its concern to viewpoint discrimination. Viewpoint discrimination has been characterized as merely an

49. 500 U.S. 173 (1991).

50. 531 U.S. 533 (2001).

51. *Id.* at 541.

52. *Id.* at 542.

53. *Cf.* *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Scalia, J., concurring) (upholding ban on electioneering near polling place "though content-based . . . it is a reasonable viewpoint-neutral regulation"); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 36, 55, 59-61 (1983) (Brennan, J., dissenting) (citing cases in which Court had upheld viewpoint-neutral but content-based restrictions on opportunity to engage in speech on government property).

“egregious form of content discrimination.”⁵⁴ Regulation based on content, not viewpoint, is often held unconstitutional. Thus, in *FCC v. League of Women Voters of California*,⁵⁵ the Court invalidated a section of the Public Broadcasting Act which forbade any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting from engaging in “editorializing.” The ban was not limited to particular viewpoints, but applied to editorializing generally. Nevertheless, the Court emphasized that the “ban is defined solely on the basis of the content of the suppressed speech,”⁵⁶ and, quoting an earlier decision, stressed that the “First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”⁵⁷ The Court expressed the concern that even though not viewpoint-based such a ban might still reflect “an impermissible attempt to allow a government [to] control . . . the search for political truth.”⁵⁸

3. *Extent of the Restriction.*—An important factor in determining the constitutionality of a grant condition is whether the condition applies only to activity funded by the grant or whether it applies more broadly to the recipient’s privately-funded activity. In *Regan v. Taxation With Representation*⁵⁹ the Supreme Court upheld an Internal Revenue Code provision allowing nonprofit organizations to enjoy tax-exempt status only if they refrain from substantial lobbying.⁶⁰ The Court noted that the tax-exempt entities were free to establish affiliates that could engage in lobbying.⁶¹ So long as the lobbying affiliate’s funds did not come from the tax-exempt entity, an organization could maintain a taxable lobbying arm without jeopardizing its tax-exempt status.⁶² The lobbying ban protected the government’s interest in assuring that its subsidy was not used for lobbying—an activity the government did not wish to fund—but did not prevent the organization from engaging in constitutionally-protected lobbying.⁶³ Similarly, in *Rust*, government-funded family planning clinics could not engage in abortion counseling.⁶⁴ However, the clinics could still “perform abortions, provide abortion-related services, and engage in abortion advocacy” as long they conducted those activities “through programs that are separate and independent from the project that receives [the restricted] funds.”⁶⁵

54. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

55. 468 U.S. 364 (1984).

56. *Id.* at 383.

57. *Id.* at 384.

58. *Id.* (quoting *Consolidated Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 538 (1980)).

59. 461 U.S. 540 (1983).

60. *Id.* at 546.

61. *Id.*

62. *Id.* at 544.

63. *Id.* at 546.

64. *Rust v. Sullivan*, 500 U.S. 173, 180 (1991).

65. *Id.* at 196.

By contrast, *FCC v. League of Women Voters*⁶⁶ and *LSC*⁶⁷ involved conditions that leveraged public funds to broadly restrict constitutionally protected activity. In *League of Women Voters*, the noncommercial educational station received only one percent of its overall income from the restricted grant but was completely barred from editorializing.⁶⁸ The Court indicated that if Congress had authorized the station to create a separate account, consisting of privately provided funds, to finance editorializing, then the speech restriction on the funds provided by the federal government would have been valid.⁶⁹ Similarly, in *LSC*, the restriction applied to grantees, not programs.⁷⁰ As a practical matter, it would have been difficult, if not impossible, to split up a welfare case so that an LSC-funded lawyer would handle the nonconstitutional issues, and a lawyer funded by private charitable contributions would raise any constitutional challenges. Moreover, the restriction also operated to constrain indigent welfare litigants generally by limiting their access to counsel.⁷¹ If an LSC-funded lawyer determined that a critical issue in the case was a constitutional one and, due to the grant restriction, she withdrew from the case so the client could take the matter to an unrestricted lawyer, the indigent client would be “unlikely to find other counsel. . . . Thus, with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict.”⁷²

These cases indicate that if the condition attached to public funding applies to all of a candidate’s campaign speech—even speech funded by private contributions or the candidate’s own resources—it is more likely to be held unconstitutional. If, however, public funds cover only a portion of campaign costs, with candidates raising private funds to cover the rest, and the campaign code constraint applies only to the publicly funded portion of the campaign, the condition might be sustained under *Regan*, *Rust*, and *League of Women Voters*. Thus, in a partially publicly-funded election, if the candidate could finance his campaign through distinct public and private accounts, the speech constraints on the publicly-funded account could pass constitutional muster as long as the candidate remained free to use privately raised funds to pay for communications not subject to the code.⁷³

However, even partial public funding will almost certainly be accompanied by a spending limit that applies to total campaign spending. That is the practice in all partial public funding systems today. As a result, unlike the recipients in

66. 468 U.S. 364 (1984).

67. *Legal Servs. Corp. (LSC) v. Velazquez*, 531 U.S. 533 (2001).

68. *League of Women Voters*, 468 U.S. at 400.

69. *Id.*

70. 531 U.S. at 536-37.

71. *Id.* at 546-47.

72. *Id.*

73. This may sound administratively burdensome but it could be a lot simpler than the multiple hard and soft money accounts—subject to different fundraising and spending rules—currently maintained by the national political parties.

Regan and *Rust*, who could raise and spend unlimited amounts of private funds to support the activities not subsidized by the federal government, publicly funded judicial candidates would be subject to a spending limit constraint on their ability to use private funds on speech that does not conform to the code. Candidates might voluntarily choose partial public funding with limits because it may still enable them to raise more money overall (while reducing the burdens of fundraising) and to be seen as “clean money” candidates. But while partial public funding might permit an increase in total campaign communications, due to the interplay of the speech constraints and the spending limit, the amount of unconstrained, candidate-determined campaign speech could be reduced. Thus, the unconstitutional conditions problem would remain.

4. *Distortion of a Medium of Expression.*—In its most recent unconstitutional conditions cases, the Supreme Court has emphasized a factor which is directly relevant to a judicial campaign speech case, albeit perhaps the most difficult factor to apply. In *LSC* the Supreme Court focused on whether the condition attached to a subsidy reflects an effort by the government “to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.”⁷⁴ By limiting the arguments a lawyer could make, the grant restriction “distorts the legal system by altering the traditional role of the attorneys”⁷⁵ as independent advocates.⁷⁶ Indeed, as judges rely on lawyers to “present all the reasonable and well-grounded arguments necessary for proper resolution of the case,”⁷⁷ the restriction distorts the judicial process as well.

LSC also found a similar concern about government-subsidized distortion of a medium of expression in the earlier *League of Women Voters* decision. According to *LSC*, the ban on editorializing by subsidized broadcasters constituted a government effort to use a grant to undermine the “accepted usage” of editorializing in broadcasting and thereby “suppress speech inherent in the nature of the medium.”⁷⁸ The broadcaster’s right to use editorial judgment with respect to the content of station programming was one of the basic “dynamics of the broadcasting system.”⁷⁹

It is difficult to determine whether the use of a public subsidy to secure judicial candidates’ adherence to a campaign speech code that eschews announcements concerning political or legal issues or misleading or deceptive statements “distorts” a medium of expression. Indeed, the issue is ultimately intertwined with the underlying question of the constitutionality of the speech codes themselves.

The argument that a campaign speech condition would “distort” the judicial election campaign is straightforward. Candidates for judicial office are entitled

74. 531 U.S. at 543.

75. *Id.* at 544.

76. *Id.* at 544-45.

77. *Id.* at 545.

78. *Id.* at 543.

79. *Id.* (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 676 (1998)).

to speak about political and legal issues.

The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary:

"The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election. . . . Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."⁸⁰

As in any other election campaign, judicial candidates' statements play a crucial role in educating the public about the records and views of the candidates and enable the voters to make an informed choice on election day. The fact that the state has determined that a judicial office is to be filled by popular election suggests a state constitutional judgment that the selection of judges ought, to some degree, reflect the views of the electorate.⁸¹ As for the codes that focus on the tone of judicial campaigning, terms like "misleading" or "deceptive" are inherently vague. Proscribing misleading or deceptive speech will inevitably chill even legitimate campaign statements and unduly narrow the range of information and arguments made available to voters. Moreover, the vagueness of the restrictions opens the door to abuses in administration and enforcement. There is, thus, the danger that elected officials or their appointees will use speech codes to interfere with the campaign process.

Elections are the ultimate "medium of expression"⁸² which must operate free of government distortion or control. Government efforts to determine the content of campaign speech arguably undermine the ability of the people to use elections to address matters of public concern and hold government accountable. Government has a critical role in structuring the electoral process but it should not determine the content of election campaigns.⁸³ Where states have chosen to select their judges through popular election, the election becomes the key means whereby the people hold their judges accountable. Government efforts to determine what should be the focus of an election would be a government

80. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976)).

81. *See Chisom v. Roemer*, 501 U.S. 380 (1991) (stating that judges are "representatives" within the meaning of section 2 of the Voting Rights Act, as amended in 1982).

82. *LSC*, 531 U.S. at 543.

83. *See Cook v. Gralike*, 531 U.S. 510 (2001) (invalidating a Missouri constitutional provision that placed a notation on the ballot indicating whether a candidate for Congress had opposed congressional term limits); *Brown*, 456 U.S. at 62 (finding a Kentucky statute prohibiting candidates from offering material benefits to voters unconstitutional as applied to candidate's pledge to lower his office's salary).

manipulation of an independent medium of expression of the sort condemned by the Supreme Court in *LSC* and *League of Women Voters*.

The argument that judicial candidate speech codes would “reform,” not “distort,” judicial election campaigns is straightforward as well. The Supreme Court has emphasized that “[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign,”⁸⁴ but it is questionable whether a judicial election campaign should be equated with other *political* campaigns. Certainly, the judicial office differs in critical respects from executive and legislative positions. Judges are not simply representatives of the voters who elect them. As Indiana Chief Justice Randall Shepard has emphasized, judges have a duty to render impartial justice to the parties who appear before them.⁸⁵ They must interpret and apply the law—statutes, and regulations, and common law rules—regardless of their own political and policy views or the preferences of the voters who elect them. A legislator or executive officer may appropriately view himself as merely an agent of the voters.⁸⁶ However, a judge must be independent of political commitments, receptive to opposing arguments, and fair to all sides in a case before her—and must be seen by the public to be independent, open-minded and fair if public belief in the impartiality of justice is to be sustained.

The distinctive judicial role has implications for the nature of judicial campaigning. It is appropriate for an executive or legislative candidate to commit himself strongly on an issue of political significance—for example, “no new taxes,” no cuts in certain programs, pro-life or pro-choice—as a way of clearly explaining to the public his views on an issue and providing an assurance that he will truly represent the views of those who vote for him if elected. However, such a strong endorsement of a particular position or point of view by a judicial candidate would undermine the judge’s ability to impartially consider the arguments raised by both sides in a case involving that position or point of view, and undermine the public’s belief that the judge’s decision was based on an impartial view of the law. As Chief Justice Shepard has suggested, the kind of political commitment that would enable the electorate to appropriately check and monitor the performance of a legislative representative or executive officer might constitute a due process violation if undertaken by a judicial candidate and adhered to by a judge.⁸⁷

Indeed, for many decades, judicial campaigns were marked by relatively restrictive speech codes and the avoidance of pronouncements on political and

84. *Brown*, 456 U.S. at 53.

85. See Shepard, *supra* note 2, at 1084.

86. This is not to say that legislative or executive officers must view themselves solely as agents of the voters. They may view themselves as Burkean trustees for the people and act based on their view of what is in the public interest, even if that is at odds with the views of those who voted for them. But it also appropriate for legislators and executive officials to make decisions based largely on the preferences of those who voted for them.

87. See Shepard, *supra* note 2, at 1069 n.51.

legal issues. Even most of the recent decisions invalidating traditional speech codes recognize the distinctive nature of the judiciary and of judicial campaigning. In striking down broad prohibitions on the discussion of political or legal issues, the courts have generally indicated that more narrowly drawn restrictions on the discussion of political or legal issues “likely to come before” the judge may be sustained.⁸⁸ It is inconceivable that such a restriction on campaigning or executive or legislative office would be valid.⁸⁹

The case for the constitutionality of a candidate speech restriction as a condition for public funding would combine a reliance on *Buckley*’s assumption that an otherwise unconstitutional spending limit would become constitutional when made a condition for a voluntary public funding program with an argument based on the substantial constitutional concerns that support the call for judicial candidate speech constraints. The argument would be that even though a judicial candidate speech constraint would be unconstitutional if mandatory, given the state’s concerns with assuring judicial fairness and public confidence in the impartial administration of justice, it would be constitutional for a state to seek to recalibrate the First Amendment/Due Process Clause balance by providing a monetary incentive for candidates to voluntarily restrict their campaign statements. Because candidates could remain outside the public funding system and still successfully seek judicial office, the condition arguably would not so much “distort” the judicial electoral process as create a parallel campaign format more consistent with the government’s legitimate goal of reducing the politicization of judicial elections.

D. Additional Considerations

1. *Comparisons with Buckley*.—In deciding whether a judicial candidate speech condition would pass constitutional muster, two further comparisons with *Buckley* may be in order. First, a campaign speech code presents a greater danger of “distorting” the campaign than a campaign spending limit. Campaign spending limits do not alter the heart of a campaign—which is what candidates and other interested individuals and groups have to say about the candidates and issues. Spending limits may restrain the quantity of speech, but not the core of candidate and interest group autonomy concerning the definition of their messages. Moreover, so long as the spending limit is voluntary and attached to the provision of funds, the total package of public-funds-plus-limits does not constrain speech. Presumably, in deciding whether or not to accept public funding, each candidate will make a choice based on which form of funding—public or private—will generate the bigger campaign war chest and, thus, ultimately fund more speech. So long as the choice is voluntary, the existence of the public-funding-with-spending-limit option can only increase the total amount of speech. It cannot reduce the amount of speech, the variety of speech or the candidates’ control over what they say.

88. *Id.* at 1093 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(c)(ii) (1990)).

89. *See Brown*, 456 U.S. at 45.

On the other hand, public funding with a campaign code can reduce campaign speech. If public funding expands the candidate's war chest, then the ability to pay for more ads and to avoid the burdens of fundraising provides a powerful incentive for a candidate to accept public funding even with a campaign speech condition. However, with the addition of a speech condition, even though candidates may be able to finance more ads, their ads may be required to say less and to address fewer issues. Moreover, the candidates will have to cede to the state the power to determine the content of their campaign messages. This closely resembles the kind of distortion that troubled the Court in *League of Women Voters* and *LSC*.

The second comparison with *Buckley*, however, may cut the other way. The due process arguments that support restrictions on judicial candidate speech may be more constitutionally compelling than the equality concerns that provided the impetus for limits on campaign spending. In *Buckley*, the Supreme Court famously—or notoriously—rejected as “wholly foreign to the First Amendment” the “concept that government may restrict the speech of some elements of our society in order to advance the relative voice of others.”⁹⁰ In the Court's view there was no equality case at all for spending limits on either candidates or independent committees.⁹¹ The only constitutional concern that could support spending limits was prevention of corruption and the appearance of corruption; that concern, however, was insufficient because, in the Court's view corruption was adequately addressed by contribution limits.⁹²

By contrast, the lower courts that have addressed restrictions on judicial candidate speech have generally agreed that there are legitimate constitutional concerns that justify some limits on candidate speech in order to assure judicial impartiality and the appearance of impartiality. Their conclusion was that certain restrictions went too far and unduly interfered with the constitutionally protected interests of candidates in addressing political and legal issues. They found that the interest in judicial fairness and integrity can be satisfied by more limited restrictions on candidate comments on matters likely to come before the court and knowing falsehoods. It may be that given the legitimacy of the government's underlying concern, a court might accept a state's determination that more restrictive measures are appropriate and would accept the state's provision of public funds to secure candidates' voluntary compliance with a more restrictive speech code.⁹³

90. 424 U.S. 1, 48-49 (1976).

91. *Id.* at 35-36.

92. *See id.* at 12-59.

93. Recent court cases narrowing judicial candidate speech codes in order to protect First Amendment rights are consistent with the 1990 Model Code of Judicial Conduct, which precludes only

pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office[,] . . . statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court[,] . . . [and] misrepresent[ations of] the identity, qualifications,

Although the Supreme Court's recent decision in *LSC* seems to put new bite into the unconstitutional conditions doctrine, it might also provide some support for the constitutionality of a judicial candidate speech condition. A central concern of the *LSC* Court was protecting an "independent judiciary."⁹⁴ The Court was troubled by the restriction on attorney speech because

[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. . . . The restriction imposed by the statute . . . threatens severe impairment of the judicial function.⁹⁵

If the Court were persuaded that judicial candidate announcements concerning either legal and political issues or misleading or deceptive statements similarly threaten to compromise the independence of the judiciary and the appearance of judicial impartiality, the Court might be willing to treat the provision of governmental incentives to avoid such announcements and statements as constitutional.

2. *Inability to Restrict Speech of Independent Committees.*—An additional factor that may be relevant to the constitutional analysis is that a judicial candidate speech code will not constrain the independent committees and interest groups that are playing an increasingly important role in judicial election campaigns.⁹⁶ In the campaign finance context, the Supreme Court has held that even when candidates accept public funding with spending limits, interest groups remain free to spend unlimited sums supporting or opposing spending-limited candidates provided their spending decisions are independent of the candidates.⁹⁷ Similarly, candidates' voluntary adherence to a code limiting their statements concerning political and legal issues and precluding them from making deceptive or misleading statements would not limit the ability of independent groups to take out ads that link candidates to political and legal positions or to make deceptive and misleading assertions about the candidates.

It is not clear how this cuts. On the one hand, it could weaken the constitutional case for a candidate speech code restriction. In assessing the constitutionality of restrictions on speech, a court will consider not only whether the restriction is supported by a compelling justification, but also whether the restriction is narrowly tailored to promoting that justification. A speech code limited only to candidates may not be effective in promoting judicial impartiality,

present position or other fact concerning the candidate or an opponent.

MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990).

94. 531 U.S. 533, 545 (2001).

95. *Id.* at 545-46.

96. See Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001).

97. See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985) (holding unconstitutional a statute that limited spending of independent committees with respect to presidential candidate who had accepted public funds).

reducing the politicization of judicial elections, or securing public confidence in the even-handed administration of justice. Independent committees and interest groups remain free to spend large sums of money on heated electioneering efforts that tie judicial candidates to particular political and legal positions. On the other hand, political statements by judicial candidates arguably pose a distinctly greater threat to judicial impartiality and public confidence than statements by third parties. A state could appropriately target its efforts not on politicization of judicial elections in general but on the particular threat to judicial integrity that results from statements by judges and would-be judges. Indeed, it could be argued that the continuing opportunity for unfettered independent committees would mitigate the loss of information and arguments relevant to voter decision-making that might result from constraints on judicial candidates.

II. CANDIDATE DEBATES AND VOTER PAMPHLETS

A. Mandatory Candidate Debates

Even if the provision of public funds to a candidate could not be conditioned on a candidate's adherence to a speech code, public funds might be used to improve the quality of judicial campaign discourse in other ways. At least three states (Arizona,⁹⁸ Kentucky,⁹⁹ and New Jersey¹⁰⁰) and two cities (New York¹⁰¹ and Los Angeles¹⁰²) require candidates who receive public funds to participate in public forums or debates. Debates can provide an opportunity for a fair and open exchange of views among competing candidates. Unlike brief sound-bite ads, debates present the candidates themselves to the voters for sustained periods of discussion. As a result, debate statements are more likely to involve positive assertions by the candidate about his credentials and views rather than negative attacks on an opponent narrated by a faceless voice. Misleading and deceptive statements may be less likely to occur with the opponent present and ready to respond. In a format that emphasizes orderly interchange with a moderator and with each other, the candidates may also have an incentive to emphasize their thoughtful, statesmanlike—or judicial—qualities, rather than engage in the cut-and-thrust of a stump speech. Although it is not clear that debates would depoliticize the content of a judicial campaign—indeed, discussion of political and legal issues might increase—they could improve the tone of the campaign's tone.

There are no cases that consider challenges to the constitutionality of mandatory debates as a condition of public funding. Candidates generally seek the opportunity to participate in debates rather than exclusion from them. Debates sponsored by government or civic organizations will usually be

98. ARIZ. REV. STAT. ANN. § 16-956(A)(2) (Supp. 2001).

99. KY. REV. STAT. ANN. § 121A.100 (Banks-Baldwin 1993).

100. N.J. STAT. ANN. § 19:44A-45 (1999).

101. N.Y.C. ADMIN. CODE § 3-709.5 (2001).

102. L.A. MUN. CODE § 49.7.19.C (1997).

perceived as an additional benefit for candidates rather than as a burden. Nevertheless, if challenged, a debate requirement is likely to pass constitutional muster. It may be enough that the public funding is voluntary, so that the candidate is free to decline to participate in the debate if she is willing to forego public funds. Even if voluntariness is not enough, debates closely serve the legitimate government interest in voter education and information, while the burden on candidate speech is minimal. Although a candidate who is a poor debater might prefer to refrain from debating, nothing in a debate requirement limits the ability of a candidate to campaign in any other way. The debate requirement would neither distort the electoral process nor take over a candidate's campaign, and therefore such a requirement is unlikely to be an unconstitutional condition.

B. Voter Pamphlets

In at least five states and the City of New York, the government produces and distributes to the voters pamphlets or guides that provide information concerning the candidates on the ballot.¹⁰³ These can be an important source of voter information, particularly in judicial elections, which are often poorly covered by the media. For many voters, the only statements they will read about a judicial election are contained in the voter pamphlet. Several judicial campaign reform proposals have called for increasing the use of voter guides or voter pamphlets,¹⁰⁴ with one bar association specifically proposing that the content of statements concerning judicial candidates be limited to "biographical data, including professional qualifications," implicitly avoiding statements on political and legal issues.¹⁰⁵

The California Supreme Court has upheld the constitutionality of a state law which tightly constrained the content of judicial candidate statements in a voter pamphlet. *Clark v. Burleigh*¹⁰⁶ considered a California law limiting the statement of a candidate for nonpartisan office (including judicial offices) to his or her name, age, occupation and a "brief description . . . of the candidate's education and qualifications," and adding specifically for judicial candidates that the statement "shall not in any way make reference to other candidates for judicial

103. See Committee on Government Ethics, *Report on Judicial Campaign Finance Reform*, 56 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 157, 165-66 (2001) [hereinafter *Gov't Ethics Report*]; Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1506 (2001); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy*, 2 J.L. & POL. 57, 127-28 (1985) [hereinafter Schotland, *Emperor's Clothes*].

104. See *Call to Action*, *supra* note 11, at 1357 (recommendation nine: "State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates."); see also *Gov't Ethics Report*, *supra* note 103; Schotland, *Emperor's Clothes*, *supra* note 103.

105. *Gov't Ethics Report*, *supra* note 103, at 166.

106. 841 P.2d 975 (Ca. 1992).

office or to another candidate's qualifications, character, or activities."¹⁰⁷ The provision was challenged by a municipal court judge who, in his campaign for a superior court seat, criticized the incumbent by name and listed examples of the incumbent's failure to "get tough with criminals."¹⁰⁸ The candidate claimed, and the intermediate appellate court agreed, that the voter pamphlet was a "limited public forum" for candidates' statements; the state could limit the category of speakers entitled to use the forum to candidates, but content restrictions on their statements would be subject to strict judicial scrutiny.¹⁰⁹

A unanimous California Supreme Court rejected the public forum claim.¹¹⁰ The court found that California did not give candidates access to the voter pamphlet to air their views generally but only to provide statements concerning their qualifications.¹¹¹ Because the statute that authorized the pamphlet limited both who could include statements and what those statements could say, the pamphlet was not a public forum for First Amendment purposes: "[I]n the statutory candidate's statement the Legislature has created a forum that is limited both as to speakers—nonpartisan candidates for local judicial office—and as to topic—the candidates' own qualifications for the office. There is no unlimited, 'public' component, and hence no designated *public* forum."¹¹²

As a result, the rational basis test—not strict scrutiny—applied, and the court found that the state could reasonably choose to limit the voter pamphlet statements to biographical information.¹¹³ The voters were unlikely to have such information otherwise, so the pamphlet promoted the state's interest in a more informed electorate.¹¹⁴ "Attack" statements could undermine the informational purpose: "[T]he statement is necessarily so brief that to the extent a candidate devotes it to attacking others it would convey even less factual information about the candidate's own background and qualifications."¹¹⁵ Moreover, given that candidates are not allowed to see their opponents' statements until the pamphlets are published, "all such candidates would have an incentive to misuse them by attacking their opponents in order to avoid the possibility of unanswered attacks by others in the same forum."¹¹⁶ In addition, the limitation in candidates' statements

restricts only this one channel of communication with the voters; there remain substantial alternative channels open to candidates for judicial office that do not bar criticism of opponents—e.g., advertisements or

107. *Id.* at 977-78 (citing CAL. ELEC. CODE § 10012).

108. *Clark v. Burleigh*, 279 Cal. Rptr. 333, 336 (Ct. App. 1991).

109. *Id.* at 337.

110. *Clark*, 841 P.2d at 987-88.

111. *Id.* at 987.

112. *Id.* at 985 (emphasis in original).

113. *Id.* at 987-88.

114. *Id.*

115. *Id.* at 987.

116. *Id.*

interviews in local newspapers or on local radio and television programs, direct mailings to the community, neighborhood distribution of handbills, and personal appearances at local functions.¹¹⁷

The California Supreme Court's public forum analysis is debatable. In an earlier decision involving a content-neutral state requirement that candidates pay a share of the costs of publishing the pamphlet's costs, the Ninth Circuit had held that the voter pamphlet is a limited public forum.¹¹⁸ A U.S. Supreme Court case concerning ballot pamphlets avoided the issue. That case involved a California law barring political parties from endorsing candidates for nonpartisan office and, *inter alia*, barring mention of such endorsements in candidate voter pamphlet statements. The Court resolved the issue on ripeness grounds and refrained from discussing the constitutional status of the voter pamphlet. In a dissenting opinion, Justices Marshall and Blackmun commented that the public forum status of the voter pamphlet is "unsettled,"¹¹⁹ while in a separate dissent Justice White concluded the voter pamphlet's "use may be limited to its intended purpose which is to inform voters about *nonpartisan* elections."¹²⁰

Whatever the public forum status of the ballot pamphlet, the California Supreme Court's resolution of the challenge to the limits on the content of candidate statements is consistent with the U.S. Supreme Court's unconstitutional conditions cases. Even with a constraint on candidate statements, the voter pamphlet could be described as a state effort to increase the amount of information available to the voters. The government could decide to promote the dissemination of just biographical information about candidates on the theory that this is the information that government wants to be certain that voters receive. The limitation is viewpoint-neutral and tightly limited to the publicly provided benefit. The restriction would resemble the restrictions sustained in *Regan* and *Rust*. Such a restriction would not reduce the range of arguments candidates can make or deny them control over the content of their campaign messages outside of the voter pamphlet. It would not limit their ability to present other information and arguments to the voters. To be sure, the pamphlet is likely to be a key source of information for many voters. However, this would be an instance of government supplementing existing campaigns with a new medium of information, not a distortion of pre-existing campaign structures.

It would probably be unconstitutional to constrain the opportunity to place a statement in a voter pamphlet on a candidate's agreement to abide by a speech code for all campaign communications. However, both the unconstitutional conditions doctrine and the California Supreme Court's analysis of the public

117. *Id.*

118. *Kaplan v. County of L.A.*, 894 F.2d 1076, 1080 (9th Cir. 1990). *See also* *Gebert v. Patterson*, 231 Cal. Rptr. 150 (Ct. App. 1986) (applying limited public forum analysis to invalidate application of fee requirement to indigent proponent of ballot argument).

119. *Renne v. Geary*, 501 U.S. 312, 345 (1991) (Marshall, J., dissenting).

120. *Id.* at 333 (emphasis in original) (White, J., dissenting).

forum question support a conclusion that a viewpoint-neutral restriction on the content of candidate statements in a voter pamphlet would be constitutional.

CONCLUSION

The central question of this Paper—could an otherwise unconstitutional judicial candidate speech code be made a condition for a candidate's participation in a judicial election public funding program—remains open. *Buckley* provides support for an argument that the voluntariness of the public funding program would be sufficient to justify a speech constraint on publicly funded candidates. However, the unconstitutional conditions doctrine suggests that some conditions that burden the liberties of grant recipients are unconstitutional even though the grantee is free to turn down the grant and the conditions.

The unconstitutional conditions question is ultimately intertwined with the underlying question of the constitutionality of speech codes. As several federal and state courts have recently found, a restrictive campaign speech constraint would burden protected First Amendment rights, while the goals of protecting judicial impartiality, and the appearance thereof, may be adequately served by more limited restraints. A restrictive speech constraint raises the specter of an unconstitutional governmental effort to transform a "medium of expression" by driving discussion of political and legal issues out of an electoral process in which political and legal issues may be central to voter decision-making.¹²¹

Nevertheless, the goals underlying judicial candidate speech constraints derive from substantial constitutional concerns of assuring due process to litigants and promoting public confidence in the administration of justice. It may be that the undoubted importance of the public goals, coupled with the voluntariness of a speech constraint, would enable a government to use public funds as an incentive to secure judicial candidates' agreement to a more restrictive speech code that would provide greater protection of judicial impartiality and greater security against the politicization of the courts.

Apart from the question of judicial candidate speech codes, states could almost certainly use public funds to secure judicial candidate participation in debates that might elevate the tone of judicial campaigns. So, too, a state could provide judicial candidates the opportunity to submit a statement, subject to content and tone limitations, that would be mailed to all voters. Although these programs would not regulate judicial campaigning outside of the debate or voter pamphlets, they would provide a means of shaping the content and tone of the information voters are most likely to rely upon when they cast their ballots in judicial elections.

121. The condition might be more likely to survive if it applies only to communications funded by the public grant. Conversely, a condition that applies to all of a candidate's spending, including the portion funded by private contributions, may create a greater constitutional burden.

A COMMENTARY ON PUBLIC FUNDS OR PUBLICLY FUNDED BENEFITS AND THE REGULATION OF JUDICIAL CAMPAIGNS

LILLIAN R. BEVIER*

Professor Briffault's paper¹ is an elegant and virtually unassailable analysis of the question of whether receipt of public campaign funds by candidates for judicial office may, consistently with modern First Amendment doctrine, be conditioned upon the candidates' agreement to certain constraints on the content of their campaign speech. In particular, Professor Briffault considers the constitutionality of conditioning receipt of public funds on judicial candidates' agreeing to avoid deceptive and misleading communications,² to participate in debates,³ to abide by viewpoint neutral restrictions on the content of their statements in voter pamphlets,⁴ and to refrain from announcing their positions on legal and political issues generally.⁵ Professor Briffault understandably finesses the question of whether these judicial candidate speech codes would violate the First Amendment if adopted without the carrot of public funding; he assumes that they would. Concluding that they pass *Buckley's* voluntariness test,⁶ he proceeds to analyze them pursuant to the notoriously indeterminate unconstitutional conditions doctrine and, not surprisingly, his analysis leads him to an indeterminate conclusion.⁷

I agree with Professor Briffault that, on the basis of present First Amendment doctrine, the central question he poses in his paper cannot be answered with confidence, at least not if one takes everything the Supreme Court has said about elections and candidates' speech in other election contexts and assumes that its underlying rationale applies with equal vigor to the speech of judicial candidates.⁸ It is on this point that this Commentary will take issue with him, though not so much with the accuracy of his analysis of the state of the law as with its normative thrust—or lack thereof. In other words, I think he is correct that courts in the future are as likely as courts have been in the past to begin their

* Doherty Charitable Professor and Class of 1963 Research Professor University of Virginia School of Law. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. Richard Briffault, *Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819 (2002).

2. *Id.* at 820.

3. *Id.* at 839-40.

4. *Id.* at 840-43.

5. *Id.* at 819-20.

6. See *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

7. Briffault, *supra* note 1, at 828-36.

8. *Id.* at 822.

analysis of judicial election speech regulations by reasoning from First Amendment premises that were developed in other election contexts.⁹ However, I have considerable qualms—more so, apparently, than does Professor Briffault—about whether this is the correct First Amendment starting point. In addition, the indeterminacy of Professor Briffault's conclusion with respect to his central inquiry invites speculation about why this uncertainty exists and how such a muddle came about. This Commentary will offer some thoughts along those lines—thoughts which will no doubt resonate with and represent variations on themes that will have permeated the discussions that have already taken place at this Symposium on Judicial Campaign Conduct and the First Amendment.

The thoroughness and transparency of Professor Briffault's analysis and his apparent familiarity of the First Amendment terrain of candidate speech generates an impression somewhat akin to that which Chief Justice Shepard expressed in his 1996 essay:¹⁰ that standard First Amendment analysis “obscures and undervalues the relationship between litigants’ interests in the neutral adjudication of their claims and judicial campaigning.”¹¹ Conventional approaches to the question of judicial candidate campaign speech have forced Professor Briffault (and courts that have ruled on First Amendment challenges to judicial speech codes) to try to fit a square peg—namely, speech of candidates for *judicial* office—into a round hole—namely, First Amendment doctrine concerning speech of *ordinary citizens* and of candidates for *legislative* or *executive* office. This is particularly apparent in Professor Briffault's analysis of whether judicial speech codes would “distort” or “reform” a medium of expression,¹² for the arguments he puts forward pass each other like ships in the night instead of taking issue with one another. This suggests that neither First Amendment doctrine in general, nor the particular doctrines that have emerged from *Buckley* and its progeny, nor the doctrinal chaos of the “unconstitutional conditions” cases that Professor Briffault so ably recounts¹³ are adequate for the task of identifying, much less of sorting out, the interests that conflict when the subject is regulation of the speech of candidates for judicial office.

One reason for this inadequacy, to be sure, is a function of the fact that First Amendment doctrine itself has become so formulaic. It pretends to invite analysts to play a sort of paint-by-numbers game and seems to suggest that if one touches all the familiar bases (“is the regulation viewpoint or content based?” “does it achieve a compelling state interest by the least restrictive means?”) the one true answer will readily emerge. In fact, however, far from eliminating the First Amendment's indeterminacy, the formulas merely disguise it. The doctrine, in other words, is like the emperor who has no clothes. This aspect of First Amendment doctrine is of course not unique to our problem of public funding

9. *Id.* at 827.

10. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

11. *Id.* at 1083.

12. Briffault, *supra* note 1, at 833-36.

13. *Id.* at 828-36.

conditioned on adherence to speech codes by candidates for judicial office, but it is exacerbated in the context we are considering. This is so simply because the interests at stake on both the First Amendment side and the governmental interest side of the balance are not interests that the Court has spent much time or effort considering. Thus what at first glance seem to be the most obviously relevant precedents offer much less guidance than First Amendment precedents usually do—and that is precious little.

Implicit in what I have just said is the controversial proposition that the First Amendment interests at stake in judicial elections are in fact different, not only in kind, but also in degree, from those that the Court has considered in prior cases dealing with candidate speech or unconstitutional conditions. The proposition amounts to a claim that candidates for judicial office are not the legal or constitutional equivalents of either ordinary citizens or candidates for other elective offices; the scope and extent of their First Amendment rights, therefore, ought not in the first instance to be measured by the same yardstick that applies to candidates for legislative or executive office. Chief Justice Shepard and others have made this point, and Professor Briffault summarizes it in his discussion of whether judicial candidate speech codes would “reform” or “distort” judicial election campaigns.¹⁴ My quibble with Professor Briffault’s paper is that it does not give the argument quite the credence or attention it deserves, nor does he fully develop its implications. Indeed, consistently with his otherwise admirable fair-mindedness, he presents—as if it were equally persuasive and normatively equivalent—the counter-argument, which is to the effect that candidates for judicial office “no less than any other person, [have] . . . First Amendment right[s] to engage in the discussion of public issues and vigorously and tirelessly to advocate [their] own election. . . .”¹⁵ But I would like to put on the table (or, perhaps, back on the table) the proposition that, although it is constitutional and indeed has become quite common to select state judges by popular election, judicial elections are not all the same as elections of legislators, presidents, or governors. Indeed, judicial elections are an anomaly when considered both in the full context of our legal and our political traditions and in terms of separation of powers principles and the function of judges within a separated powers regime. Because judicial elections put both rule of law norms and commands of the due process clause at substantial risk, and because they invite judges to become embroiled in explicitly political disputes, neither the First Amendment rules of the democratic political game nor its solicitude for individual speakers are necessarily the appropriate starting point of analysis when it comes to regulating the speech of candidates for judicial office.

I take up the former point first. Consider what our rule of law tradition requires:

The rule of law signifies the constraint of arbitrariness in the exercise of government power. . . . [I]t means that the agencies of official coercion

14. *Id.* at 833-36.

15. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), *quoting Buckley*, 424 U.S. at 52.

ARTICLES

RESPONDING TO THE PERVERSION OF *IN LOCO PARENTIS*: USING A NONPROFIT ORGANIZATION TO SUPPORT STUDENT-ATHLETES

W. BURLETTE CARTER*

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* Professor of Law, The George Washington University Law School. B.A., Agnes Scott College; J.D., Harvard Law School. I thank the National Collegiate Athletic Association for providing me access to its library and thereby to many of the documents cited within this piece. I also thank the editors of the *Indiana Law Review* for their excellent assistance in bringing this Article to publication.

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INTRODUCTION

In the early 1920s, Alice Tanton, an eighteen-year-old college student, took a few wrong turns. She jumped into a young man’s car and rode around on the streets of Ypsilanti, Michigan, sitting on his lap and smoking a cigarette. An onlooker, who knew that Alice attended Michigan State Normal College (“MSNC”), reported her behavior to its Dean of Women, Mrs. Bessie Leach Priddy. After affording Alice the opportunity to explain herself, Mrs. Priddy expelled Alice from the college and MSNC’s president affirmed that decision. Alice (by her next friend) sued for reinstatement, but the courts would hear none of it. Indeed, the Supreme Court of Michigan stated flatly: “Instead of condemning Mrs. Priddy, she should be commended for upholding some old-fashioned ideals of young womanhood.”¹

In affirming the college’s action, the *Tanton* court was merely embracing an ages-old rule that had governed relations between students and their schools since the very beginning of American colleges and universities. These institutions acted “*in loco parentis*,” or, in the position of parents vis-a-vis their students.² By law, the institution had full authority to control the student’s

1. *Tanton v. McKenney*, 197 N.W. 510, 513 (Mich. 1924). The trial court found that Alice was guilty of the act described as well as “other acts of indiscretion” and that “she aired her grievances . . . in the public press,” which in turn tended to prevent her return to the institution and the maintenance of discipline there. *Id.* at 511. The Supreme Court of Michigan also considered very important the fact that the Normal School prepared students for the teaching profession. *See id.*

2. Literally, the doctrine means “in the place of a parent.” BLACK’S LAW DICTIONARY 791

behavior, including the power to regulate social conduct it deemed undesirable. It did not matter that in the 1920s women were gaining increasing social liberties.³ Those challenging a college or university's regulations had to overcome a strong legal presumption that the regulations were both reasonable and fair.

This Article uses the *in loco parentis* doctrine to offer a revised history of intercollegiate athletics regulation and to critique, as well, the modern regulation of intercollegiate athletics. It posits that, in the Nineteenth Century, when institutions first began to give serious consideration to the regulation of campus athletics, the *in loco parentis* doctrine provided the social and legal basis for exercising broad controls over student-athletes. The Article further argues that while the *in loco parentis* doctrine long ago met its demise in the larger college and university context, in the field of intercollegiate athletics regulation, a perverse version of that doctrine continues to survive. Under this mutation of the doctrine, the alleged parent (the institution) continues to exercise broad controls over the alleged child (the student-athlete) and yet the parent is unable to fulfill its responsibilities in protecting the welfare of the alleged child because the parent has an overwhelming financial interest in exploiting the child's talents. Indeed, like the greedy parents of a financially-valuable child actor, institutions have consistently pushed their charges onto more and more national stages in pursuit of greater and greater financial returns, all the while insisting that their charges cannot handle greater independence. And like many former child stars arriving at adulthood, many student-athletes have begun to question their alleged parents' motives.

Of course, student-athletes are not small children, and the very emergence of the perverted *in loco parentis* doctrine in athletics regulation demonstrates how far institutional athletics regulation has deviated from the educational high road. This strange strain of the doctrine also demonstrates why unquestioning judicial deference to institutions in matters relating to athletic policies cannot be justified, particularly when student-athlete rights are at issue.

But beyond deference, what is also needed is a model for removing the conflicted parent as final arbiter of student-athlete rights and welfare. I propose that an independent nonprofit organization, or several, should have the status to identify and, where appropriate, assert student-athlete rights and interests. A number of nonprofits currently exist in amateur sport, however, regulations and interpretations of the National Collegiate Athletic Association ("NCAA"), prevent them from playing the role discussed here. These barriers, I will argue, arise out of a perverted form of the *in loco parentis* doctrine and are now ripe for legal challenge.

This Article is a continuation of a project first begun in an earlier work entitled *Student-Athlete Welfare in a Restructured NCAA*.⁴ In that work, I

(7th ed. 1999).

3. In 1920, the Constitution was amended to give women the right to vote. See U.S. CONST. amend. XIX.

4. See W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J.

examined the history of the NCAA structure and the impact of the recent restructuring, which essentially decentralized the NCAA. As does this piece, *Student-Athlete Welfare* argued for reduced judicial deference in the review of athletic policies as they affect student-athletes. It also took the unusual step of questioning prevailing wisdoms regarding intercollegiate athletics history and reviewed original NCAA documents, including NCAA proceedings.⁵ The attempted contribution was not only a proposal—that courts should give less deference to the NCAA and member institutions on matters affecting student-athletes—but also the bringing to light of factual information from documents that are even now largely unavailable to the public.⁶ This Article takes that earlier project a step further, reviewing these and other early documents to determine what they tell about the considerations that drove early intercollegiate athletics policy, where the policy now stands, and where it should be headed.

This Article has four parts. Part I investigates the role of the *in loco parentis* doctrine in early college and university life. It posits that the doctrine had three “legs”: (1) a “control leg” allowed the institution to exercise broad controls over students’ lives; (2) a “welfare leg” tempered these controls by requiring that they

SPORTS & L. 1 (2000).

5. While there are many publications criticizing the modern NCAA and intercollegiate athletics, there is no reliable detailed history focusing primarily upon the early days of intercollegiate athletics. An exception is the NCAA’s own commissioned history, written by sports reporter Jack Falla. Falla’s book is a useful resource, but its celebratory approach too often glosses over the very difficult policy issues that have confronted the body and its members. Moreover, it provides very few direct citations to guide serious researchers. See JACK FALLA, *NCAA: THE VOICE OF COLLEGE SPORTS: A DIAMOND ANNIVERSARY HISTORY 1906-1981* (1981). The famous 1929 Carnegie Foundation study on intercollegiate athletics provides some historical insight, but its empirical information primarily relates to the 1920s era. Moreover, the Carnegie study’s perspective is primarily academic; thus, it seeks to tie the problems with sport to perceived academic deterioration overall—such as the rise of research as a focus of educational institutions and the growth of the elective system. See HOWARD SAVAGE, *AMERICAN COLLEGE ATHLETICS, REPORT OF THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1929). Other sports histories spend very few pages on the history of intercollegiate sport. Of these general histories, the better ones are JOHN RICKARDS BETTS, *AMERICA’S SPORTING HERITAGE: 1850-1950* (1974); ELLIOTT GORN & WARREN GOLDSTEIN, *A BRIEF HISTORY OF AMERICAN SPORTS* (Eric Foner ed., 1993); STEVEN A. RIESS, *SPORT IN INDUSTRIAL AMERICA: 1850-1920* (1995).

6. The only place that this author has found a complete set of the proceedings, from 1906 to the present, is in the NCAA library itself, now located in Indianapolis. They are not available in the Library of Congress and even the libraries of the institutions that were instrumental in shaping early intercollegiate athletics have only scattered copies, if any. While NCAA Publishing has some earlier documents for sale, practically all are post 1967, and they informed me that they do not replace these volumes once the supply has run out. Given the difficulty of access, it is little wonder that modern researchers have largely ignored these documents in discussing intercollegiate athletics. On the other hand, the lack of access may be a direct result of a lack of interest among research faculty, itself caused by the bifurcation of athletic and nonathletic institutional realms. See *infra* discussion Part II.C.

be justified as necessary to protect the student's welfare or a larger public good; and (3) a "deference leg" justified a strong presumption in favor of the institutional decisionmaking, even against parental dissent. Part I then applies this analysis to the history of intercollegiate athletics by looking at original historical materials such as early convention proceedings of the NCAA.

Part II discusses the general demise of the *in loco parentis* doctrine in the 1960s and 1970s and the resulting expansion of freedoms that came to college and university students. It seeks to demonstrate that student-athletes did not experience the same broad expansion of rights as did nonathlete students and that, indeed, during this period, control over student-athletes' behavior increased dramatically even as institutional action to protect their welfare decreased. I offer many reasons for this differing treatment of student-athletes and nonathlete students, including the bifurcation of the university into athletic and nonathletic fiefdoms and increased financial investments in athletics. I argue that institutions' strong interest in athletics poses a conflict of interest between the alleged "parent" and the alleged "child." The result is a perversion of the *in loco parentis* doctrine, one in which control takes center stage and welfare is shuttled to the background. The courts protected this perversion because of a longstanding deference to institutions on matters deemed merely "educational," and a judicial willingness to assume that intercollegiate athletics programs were just that.

By focusing upon NCAA legislative approaches in two subject areas, the handling of student-athletes' rights to free speech and the handling of student-athletes' financial aid issues, including the rights of student-athletes who receive athletic aid to work, Part III demonstrates how the *in loco parentis* doctrine continues to be reflected in modern NCAA policy.

Finally, Part IV renews the argument for reduced judicial deference made in *Student-Athlete Welfare* and investigates the option of using the vehicle of a nonprofit organization—or possibly several nonprofit organizations—to provide support to student-athletes involved in intercollegiate athletics. It argues that such vehicles may present the best way to provide student-athletes with the support that they need, support neither the NCAA nor its institutions can provide in-house. The nonprofit organization need not be the only route pursued but could complement other proposed avenues of student-athlete empowerment not addressed here, such as unionization or proposals for payment of stipends to student-athletes.

I. THE EARLY RELATIONSHIPS BETWEEN COLLEGES AND UNIVERSITIES AND THEIR STUDENTS

A. "In the Place of a Parent"

Today we are quite accustomed to college students acting as young adults and exercising a broad spectrum of individual rights. Upon reaching the age of majority, they may smoke and drink; they may vote; and they may associate with friends of their choosing and spend their own money as they please. But such was not always the case in the early days of American education, and it was

certainly not the case when colleges first began to notice their students' growing interest in sports.

Nine colleges made up the first colonial colleges in America.⁷ Many of the early colleges were created to train men who could carry out religious aims.⁸ The colonial college served the aristocracy of the times; its cost and the impractical nature of its curriculum (e.g., the focus upon subjects such as Latin) made college an unreasonable option for the average farmer's son.⁹ Soon colleges would begin to grow in number, and the idea that a college education should be more widely available, at least to white males, began to catch on, again often at the instigation of religious institutions.¹⁰

The colleges of these early centuries considered themselves *in loco parentis*—acting much like a parent with respect to their students. Indeed, Bledstein notes of the Eighteenth Century:

[T]he stage of behavioral development called "young manhood" did not exist as a notable epoch, a distinct period or era in human time characterized by specific events, unique problems, and a distinct culture. College officials did not think of students as a special social group. Students were children, being prepared for a calling, who needed to be confined to a college or boarding school in order to survive the awful temptation of worldly vice during the "midpassage" to adulthood. In the self-contained college community, a student was housed under one roof with his instructors, and all proceeded together through the uniform daily routine of prayers, meals, recitations, and study.¹¹

This lack of distinction between college students and students of more tender years is also reflected in the *Tanton* decision, wherein the court compared the powers of college administrators in that case as much like those of "school boards in our country schools and boards of education in our cities."¹² Indeed,

7. See FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 3 (Univ. of Ga. Press 1990) (1962). These colleges were "Harvard, William and Mary, Yale, New Jersey, King's, Philadelphia, Rhode Island, Queen's, [and] Dartmouth." *Id.*

8. See *id.* at 5-11 (discussing religious influence in founding of schools); *id.* at 16-18 (discussing lessening influence of particular denominations in favor of religious diversity at some colonial colleges).

9. See *id.* at 18-22; see also BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* 209 (1976) (noting that colonial colleges together graduated fewer than fifty students per year from 1701 to 1750, primarily from elite families).

10. See generally RUDOLPH, *supra* note 7, at 44-67 (discussing the growth of access to colleges in the Nineteenth Century); *id.* at 307-28 (discussing the development of women's colleges and coeducational education).

11. BLEDSTEIN, *supra* note 9, at 208; see also GEORGE P. SCHMIDT, *THE LIBERAL ARTS COLLEGE* 78-86 (1957) (discussing strict codes of conduct and disciplinary sanctions at early institutions).

12. *Tanton v. McKenney*, 197 N.W. 510, 511 (Mich. 1924).

in upholding the college's action, the court relied almost entirely upon case law involving secondary or elementary schools regulating students of a much younger age. In so doing, the *Tanton* court demonstrated the extent to which it and other courts believed that the traditional *in loco parentis* doctrine also operated in full measure on college campuses.¹³

As demonstrated by Alice's case, the parental authority schools exercised under the *in loco parentis* doctrine included the authority to mold the moral character of the student.¹⁴ Thus, like many other institutions of its day, Nineteenth Century Harvard College required each student, on pain of expulsion, to attend church every Sunday.¹⁵

As Alice's case also demonstrates, the right of the institution extended beyond the campus. Berea College was not unusual when, in its 1911 "Students Manual," it prohibited its students from entering certain "[f]orbidden [p]laces" including "any 'place of ill repute, liquor saloons, gambling houses' etc."¹⁶ Berea's rules further stated:

Eating houses and places of amusement in Berea, not controlled by the college, must not be entered by students on pain of immediate dismissal. The institution provides for the recreation of its students, and ample accommodation for meals and refreshment, and cannot permit outside parties to solicit student patronage for gain.¹⁷

The *in loco parentis* doctrine was not merely local school policy, it was legal policy and courts adhered to it well into the Twentieth Century. The doctrine

13. Without distinction, in discussing this college student's case, the *Tanton* court quoted extensively from *Ruling Case Law's* description of the relationship between public schools and their students and its description of the court's obligation to defer to the judgments of boards of education. *Id.* at 512-13 (citing 24 R.C.L. 574-75, 646 (1929)). It also cited numerous cases dealing with elementary and secondary schools.

14. For a brief history of the doctrine, see Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator*, 23 J.C. & U. L. 755 (1997); Philip M. Hirshberg, *The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189 (1994); Theodore C. Stamatakis, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471 (1990).

15. See, e.g., ANNUAL REPORTS OF THE PRESIDENT AND TREASURER 1881-82, at 20 (1882) [hereinafter HARVARD ANNUAL REPORT 1881-82] (noting that the faculty thought prayers should be made voluntary, but the board insisted upon compulsory prayers); BULLETIN OF THE UNIVERSITY OF SOUTH CAROLINA 76 (1908) (noting requirement of morning prayers and Sunday service attendance absent a parental excuse provided to the President); see also RUDOLPH, *supra* note 7, at 75-76 (discussing compulsory daily prayers and church services). Bledstein notes that apart from expulsion, a school's powers included "corporal punishment, fines, and deprivation." BLEDESTIN, *supra* note 9, at 209. Rudolph refers to the trend as "paternalism." See RUDOLPH, *supra* note 7, at 103-09 (generally discussing college efforts to control student behavior).

16. See *Gott v. Berea Coll.*, 161 S.W. 204, 205 (Ky. 1913).

17. *Id.*

was such an important a part of the common law that it was rarely challenged in the courts before the 1900s, and challenges after that time, before the 1960s, were largely unsuccessful. Thus, when a restaurant owner whose business depended heavily upon student patronage sued Berea College to challenge its prohibition of students eating at an establishment not owned by the College, the Court of Appeals of Kentucky justified Berea's action under the *in loco parentis* doctrine. The court stated:

College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.¹⁸

The court noted that the power extended beyond the school grounds "to all acts of pupils which are detrimental to the good order and best interest of the school, whether committed in school hours, or while the pupil is on his way to or from school, or after he has returned home."¹⁹

As the aforementioned case involving privately-supported Berea College²⁰ indicates, private and public institutions alike took advantage of the *in loco parentis* doctrine. While courts of earlier times regularly described the relationship between privately-funded schools and their students as "solely contractual," they regularly resorted to the *in loco parentis* doctrine to approve institutional action, declaring the doctrine to form a part of the "common law" of all contracts between private educational institutions and their students.²¹ And while theoretically, institutions supported by the state faced greater restraints

18. *Id.* at 206.

19. *Id.* (citation omitted).

20. *Id.* at 205-06 (noting private status).

21. See, e.g., *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1924) (noting that "[t]he relation between a student and an institution of learning privately conducted, and which receives no aid from the public treasury, is solely contractual" and upholding school's right to expel disorderly students under the *in loco parentis* doctrine and the "common law of the school" (quoting *Vermillion v. State ex rel. Englehardt*, 110 N.W. 736, 737 (Neb. 1907)). The student's conduct in *Stetson*, if properly described, was probably sanctionable even under modern standards, but the point is that the court embraced a broad view of the college's powers of acting as a parent, rather than relying solely upon contract theory. Courts also backed private institutions that sought contractual assurances of morality from students. See, e.g., *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435 (App. Div. 1928) (affirming institution's right to dismiss student on rumors that she was not "a typical Syracuse girl" and citing express morality provisions in catalog, the referencing of those regulations on student's signed registration card and the "wide discretion" afforded institutions to determine when dismissal is appropriate under their rules).

under the federal and state constitutions, the rights of students were not thought of as broadly as they are today, as poor Alice herself learned.

B. *The Three-Legged Stool*

This author proposes that we may describe the original *in loco parentis* doctrine as having three key legs: (1) a *control* leg; (2) a *welfare* leg; and (3) a *deference* leg. The control leg permitted the institution to place broad controls on student behavior, such as forbidding a female student to ride in a car in public while sitting on a man's lap or requiring a student to eat at college facilities only. Balancing the control leg was the welfare leg. It provided justification for the controls by positing that the controls were needed to protect the student's welfare and for societal good. Of course, conceptions of student welfare were controlled by the assumption that students were infants with no independent rights. Thus, *student* welfare was difficult to distinguish from *institutional* welfare, except in the most unusual cases. Finally, the deference leg gave the doctrine its teeth, transforming the doctrine from a mere social rejection of student rights into a legal vesting of power and authority in educational institutions. Indeed, courts often backed institutional decisionmaking regarding students even when parents took a different view.²² The doctrine represented a governmental view that educators were uniquely situated (unlike employers, for example) to shape the character of those with whom they dealt on a daily basis and that institutions could be presumed to perform this task of socialization to the community's full satisfaction. I contend that each of these three legs—control, welfare, and deference—were essential to a delicate balance that supported the *in loco parentis* doctrine.

C. *Using the In Loco Parentis Doctrine to Understand the Emergence of Campus Athletics Regulation*

Commentators who have assessed institutional involvement in amateur athletics regulation have failed to take note of the fact that it arose in the shadow of the *in loco parentis* doctrine. Indeed, I would argue that without the support of such a doctrine, modern institutional control of amateur intercollegiate athletics could never have evolved as it has.

Campus athletics began as unsupervised student games. Savage notes that in the Eighteenth Century, athletics "were characterized by an almost complete absence of anything approaching organization, rules, or what we now regard as team games as distinguished from contests between sides."²³ In those days, schools had little involvement in the administration of regular athletics. More often, their "involvement" was in the form of prohibitions. The religious and Victorian heritages of many of the early institutions rejected recreational physical

22. Alice Tanton's mother, for example, joined in her petition as next friend to no avail. See *Tanton v. McKenney*, 197 N.W. 510 (Mich. 1924).

23. See SAVAGE, *supra* note 5, at 15.

activity as contrary to sound discipline,²⁴ and, thus, many colleges of the colonial era frowned upon sporting activities. In 1787, Princeton forbade its students to play “shinny,” a game similar to hockey, decrying that it was “low and unbecoming gentlemen and scholars, and is attended with great danger to the health.”²⁵ Other institutions imposed similar restrictions.

Campus sport, like the institutions in which it occurred, began to take off in the early to mid-1800s. The growth of sport was fed by, among other things, the growth of the colleges and universities themselves, the growth of towns and cities,²⁶ the emergence of city athletic clubs and American YMCA and YWCAs,²⁷ the influx of immigrants who introduced the German gymnasium movement,²⁸ and new ideologies of manhood that embraced vigorous physical recreational activity.²⁹ So too, the growth of professional baseball with its traveling teams had an impact, offering students summer opportunities to play the game.³⁰

Sport posed a difficulty for early college administrators. It was not, in the traditional liberal arts sense, an academic endeavor. Some viewed it as downright frivolous, even a socially dangerous activity to be discouraged. Over time, however, a few college and university leaders began to believe that, properly supervised, education in physical fitness (of which sport could be a part) could add value to one’s education. Institutions began to build facilities to

24. Savage attributes the view to the English and religious heritage of these institutions. *See, e.g., id.* at 14; *see also* BLEDSTEIN, *supra* note 9, at 255-56 (stating that early colleges “frowned upon games and sports as carnal and frivolous diversions, amusements both harmful to the mind of a gentleman and subversive of the duties of a Christian . . .”); GORN & GOLDSTEIN, *supra* note 5, at 58-64 (discussing religious and Victorian objections to sports).

25. *See* RUDOLPH, *supra* note 7, at 150-51. Rudolph also discusses Rensselaer Polytechnic Institute’s similar ban on “running, jumping, and climbing” as undignified to the deportment that “becomes a man of science.” *Id.* at 151.

26. This historical growth is chronicled in a number of scholarly books. *See supra* note 5.

27. *See, e.g.,* BETTS, *supra* note 5, at 98-101, 107-08. The YMCA was founded in England but spread throughout the United States in the 1850s as a predominantly Protestant Christian movement. *Id.* at 107-08.

28. *Id.* at 105-06 (discussing the German-inspired “Turner Movement” which promoted physical education training in schools and in the community); *see also* RUDOLPH, *supra* note 7, at 152-53 (describing immigrant contribution to growth of the German gymnasium movement in the United States).

29. Darwin’s theories and the emphasis on the survival of the fittest formed an important backdrop for this movement. *See* CHARLES DARWIN, *THE ORIGIN OF SPECIES* (1859); *see also* BETTS, *supra* note 5, at 91 (noting how ideologies of manhood affected evolution of sport). By the start of the 1900s, moved by this trend, President Theodore Roosevelt was a strong supporter of sport. *See* discussion *infra* Part I.C.1.

30. *See* BETTS, *supra* note 5, at 92-93 (noting that by 1860 there were fifty-four clubs in the National Association of Base Ball Players and by 1867 there were 237 teams). The Cincinnati Red Stockings set the standard for traveling professional teams with their tour in 1869. *Id.* at 95. For more on student participation in these leagues, *see* summer baseball discussion *infra* Part I.C.1.

support this "education," and to add personnel who could serve as educators. Thus, Harvard built "the first American college gymnasium" in 1826.³¹ Amherst initiated a professorship in physical education and hygiene in 1860.³² The University of Chicago created a department of physical education and appointed Alonzo Stagg as its director with faculty status.³³ Betts reports that by 1890, virtually every established college had gained or "campaign[ed] for adequate gymnasium facilities."³⁴

On their own, students soon took campus athletics beyond intramural games as they initiated intercollegiate contests. Credit for inaugurating intercollegiate athletics is traditionally given to students at Harvard and Yale who organized a crew competition between the schools in 1852.³⁵ In 1859, Williams and Amherst students arranged the first intercollegiate baseball game.³⁶ In 1869, students at Rutgers and Princeton organized the first intercollegiate football game (then a game "more akin to soccer" than football today).³⁷ Also, in 1895 the first intercollegiate basketball game took place between Minnesota State School of Agriculture and Hamline College.³⁸

In those early days students ran athletic programs and teams, not coaches or athletic directors.³⁹ On some campuses, voluntary student-run athletic associations exercised jurisdiction over many different sports and communicated with similar associations on other campuses. In some cases, the complexity of these organizations was substantial, with team captains scheduling trainings, practices, and game schedules.⁴⁰ At some schools, these groups financed their work through membership fees, gate receipts, and fund raisers.⁴¹

But as college administrators observed their students' increased voluntary participation in sports, fears arose that sporting endeavors challenged many

31. BETTS, *supra* note 5, at 105.

32. BLEDSTEIN, *supra* note 9, at 257 (speaking of Amherst and of this general movement in the 1800s).

33. Hal A. Lawson & Alan G. Ingham, *Conflicting Ideologies Concerning the University and Intercollegiate Athletics: Harper and Hutchins at Chicago, 1892-1940*, 7 J. SPORT HIST. 37, 38-39, 41 (1980).

34. BETTS, *supra* note 5, at 101.

35. See, e.g., Joana Davenport, *From Crew to Commercialism, The Paradox of Sport in Higher Education*, in SPORT & HIGHER ED. 5, 6-7 (Donald Chu et al. eds., 1985); Gregory S. Sojka, *The Evolution of the Student-Athlete in America: From the Divinity to the Divine*, in *id.* at 19; see also SAVAGE, *supra* note 5, at 19.

36. FALLA, *supra* note 5, at 26.

37. *Id.* at 6 (noting similarity to soccer); SAVAGE, *supra* note 5, at 19.

38. FALLA, *supra* note 5, at 28.

39. See Clarence A. Waldo, *The Proper Control of College Athletic Sports*, in PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 40, 40 (1909) [hereinafter 1908 IAAUS PROCEEDINGS] (noting that the coach or trainer, if there was one, served as an assistant to the captain).

40. RIESS, *supra* note 5, at 122-23.

41. *Id.*

established value systems favored by their institutions. At the same time, it was apparent to many institutional actors that sporting events offered valuable fundraising and advertising opportunities that, if properly tapped, could be of great service to the institution.

1. *Raising up Gentlemen Amateurs.*—Foremost among the concerns of elite institutions was the tradition of the gentleman-amateur. In the Eighteenth Century, American educational institutions saw their mission as raising gentlemen, and to these institutions, the very essence of gentlemanly behavior in athletics was “amateurism.” This approach was also likely grounded in America’s English heritage. According to one writer, the term “amateur” was used to enforce the term “gentleman” in Nineteenth Century England. Indeed, in that century the terms “gentleman” and “amateur” were used synonymously.⁴² Another writer similarly points out that in earlier times an amateur player of sport and music was referred to as a “gentleman” and that “[i]n some fields amateurism was an honorable tradition, where attempts at full-time employment, to say nothing of professionalization, were met with derision.”⁴³ Indeed, it was considered “despicable to make money in this way.”⁴⁴ Thus, for those institutions that shaped America’s earliest athletic policies, “amateurism” was the key ingredient that linked education to athletics. Amateurism meant many things, but first and foremost it meant that students could not receive pay in any form, including financial aid for play, and students had to be kept far apart from those who were paid to participate in sports.

The problem of ensuring amateurism was a real one for the colleges and universities that first encountered campus athletics. Seeking to better their chances of success, college students sometimes permitted nonstudents, and sometimes professional players, to participate on their teams. In cities and towns, students often intermingled with such nonstudents in sporting activities. During the summers, some of the better college student players traveled and played with the emerging professional leagues, receiving, of course, pay for their “work.”⁴⁵ Under the *in loco parentis* doctrine, these on and off campus frolickings were every bit the college or university’s concern. In 1882, Harvard’s

42. See P.C. MCINTOSH, *SPORT IN SOCIETY* 178 (1963). McIntosh notes that the professional athlete was considered one who had fallen away from the ideals of the ruling class. The 1803 Oxford English Dictionary’s definition of “amateurism” as it related to artists linked the term to “polite” artistic undertakings “without any regard to pecuniary advantage.” *Id.*

43. ROBERT A. STEBBINS, *AMATEURS: ON THE MARGIN BETWEEN WORK AND LEISURE* 20-21 (1979).

44. *Id.* at 21.

45. According to one report in 1870, a Harvard student baseball team toured New York, the South, and the West, playing forty-four baseball games (both during summer vacation and during the academic terms). In 1882, the student team played games with professional teams. J.H. McCurdy, *The Essential Factors in the Control of Intercollegiate Athletics*, in *PROCEEDINGS OF THE FOURTH ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES* 55, 58 (1909) [hereinafter 1909 IAAUS PROCEEDINGS]; see also *HARVARD ANNUAL REPORT 1881-82*, *supra* note 15, at 16-17.

President Charles Eliot, noting the baseball games students played on Harvard yard, emphasized in his Annual Report the need to keep college baseball players “amateurs,” separate and apart from professional players.⁴⁶ Thus President Eliot concluded:

It is also agreed that athletic competitions, though necessary to the maintenance of a proper interest in the general subject, may easily run into excess, and on that account need to be kept within discreet limits; and that the whole spirit of College sports and contests should be that of amateurs who are amusing themselves, and not that of professional players who are earning a living, and seeking a reputation for its pecuniary value.⁴⁷

Those opposing professionalism were from society’s upper crust, and they brought to the debate their own stereotypes about the professional athlete and sporting endeavors in general. Thus, in the 1880s, Harvard’s President Eliot stated that “[m]any people take it for granted that the students who are conspicuous in athletic sports are capable of nothing better . . . [t]his is by no means the case.”⁴⁸ Others argued that it was the professional environment that made the professional a bad seed. The view was that the student-athlete needed to be protected from the professional, lest the student be enticed by professionalism and miss the point of play for its own sake. In a 1908 debate E.J. Bartlett put the case this way:

[T]he athlete who plays the game for pay in vacation is not an aid but a hindrance to the best in sport. He associates with and is managed by men whose living comes from their success in sport. There are professional athletes of high moral and ethical standards, but to hold to them they must be of resistance superior to that of most men. The professional athlete is the admiration of the sensual woman, the coveted prize of the false sport who wants to buy him, the very implement and object of enormous gambling operations, a golden sandwich man to the cigarette maker, a sojourner in strange places where his warmest welcome is in the bar and pool rooms. Naturally he is always looking for his price. He must win to maintain his popularity. His livelihood is at stake and his temptation is a little greater than others’ to forget to be generous in sport

Now the college athlete who has been breathing this air comes back a little harder to lift to the rarer level of sport-with-nothing-in-it, a little less ready for the chimerical standard of “a game well lost is better than

46. See HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 17-19.

47. *Id.* at 19. See generally Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269 (1994) (discussing how, by defining student participation in intercollegiate athletics as an avocation, the NCAA and the elite institutions that initially comprised it embraced only one of two possible models of student-athlete participation).

48. HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 18.

a game badly won." He makes the college team his means of advertising for another lucrative position⁴⁹

Thus amateurism also exemplified a kind of sportsmanship and an approach to the game that many believed professionals could not sustain.

Some believed that professionals were behaviorally of a lower class than those who received no pay for play.⁵⁰ Chicago's Alonzo Stagg argued that, while professionalism was not ethically wrong, most professionals celebrated the individual, not the team, and would not swear off tobacco or alcohol or adhere to a strict diet for the benefit of a team.⁵¹

Surely, providing some support to the anti-professional bias was a bias against the class of persons who engaged in, or even worse, made their living from physical activity. The early leaders of the American college and university were from elite social classes in which men inherited wealth through family membership, and their students were largely from the same elite classes. Indeed, by the mid-1800s more than seventy percent of Harvard College's enrolled students had received their secondary education in private schools or been privately tutored.⁵² Of course, even the most intellectually dense of the wealthy's children inherited the appearance of success and the support mechanisms to sustain it. Perhaps an assumption that others were simply not the best and the brightest was a necessary rationalization. This view would be consistent with the emerging social Darwinism of the mid- to late 1800s sometimes used to justify class stratification.⁵³ It may also have been true that the uppercrust saw athletics as a form of "service" unworthy of their lot, and that this factor led the elite to believe that the proper place of their children, if they must be associated with athletics, was in the stands and not on the ball field. Whatever the case, those who were not heirs to wealth faced the practical problem of earning money. For males at least, athletics was one available venue to accomplish this.

The assumption that amateurism is inherently superior to professionalism appears later in the leading literature on the subject of athletics. Most notably, it was embraced by Howard Savage in his 1929 report on athletics done for the Carnegie Foundation. Savage acknowledged that amateurism was a "social convention"⁵⁴ that relied upon the assumption that "the man who plays a game for fun, or for the love of it, or for sport's sake, is in some way advantaged over

49. J.P. Welsh et al., *Debate: Should Any Student in Good Collegiate Standing Be Permitted to Play in Intercollegiate Baseball Contests?*, in 1908 IAAUS PROCEEDINGS, *supra* note 39, at 53, 59-60.

50. *See id.* at 72 (comments of Chase) (acknowledging that others hold this view, but rejecting it).

51. *Id.* at 64 (comments of Stagg).

52. HARVARD COLL., PRESIDENT'S REPORT FOR 1873-74, at 8 (1873-74) (chart noting public school representation in student body as hovering between twenty-four percent to thirty-eight percent from 1867 to 1874).

53. Darwin's *Origin of Species* was published in 1859. *See* DARWIN, *supra* note 29.

54. SAVAGE, *supra* note 5, at 301.

the man who makes a living at it.”⁵⁵ Thus, Savage argued that “society” maintains the convention of amateurism for its own good.

Savage also accepted the social bias that long haunted athletics and those who played it. In response to those who pointed out that students with talents in other fields such as music, writing, and art were permitted to pursue professional interests (and so, why not athletes?), Savage responded that the “skills” needed for music, writing, or art are “primarily mental or emotional” and that physical skill enters only as a part of the mechanics of expression.”⁵⁶ By contrast, he argued:

Sport involves the larger muscles of the human body and their coordination, almost always in violent exertion. Its “skills” are primarily physical; mental and emotional “skills” are present, but they vary between sports. Sport in general implies the overcoming of opposition of an obstacle—physical, mental, moral—which is immediate. The resulting contest is carried on under certain conventions. Through the relation of these conventions to the desire to excel, sport tests the good temper and chivalry of its participants.⁵⁷

Thus, Savage and the Carnegie Foundation embraced the concept of sport as requiring relatively few intellectual skills.⁵⁸ It followed then that men who had the option of “higher” pursuits should be directed away from significant attention to athletics.

2. *Preserving the Institution as a Place of Education.*—As they watched their charges’ increasing interest in sports, many institutional leaders believed that students were simply spending too much time on athletics and not enough time on study. Observing what he considered to be excessive time spent on athletics, Harvard’s President Eliot convened a committee to study athletics on that campus and later argued that two hours a day of athletic involvement during the school year should be the absolute maximum limit.⁵⁹

55. *Id.*

56. *Id.* at 303. “These pursuits, in their more competitive development, afford tests of even temper and self-control, but such tests are in general not sudden or violent; in other words, they offer opportunity for a degree of reflection which may considerably delay and modify the reaction of any stimulus.” *Id.*

57. *Id.* at 304.

58. Many argue that these stereotypes remain in existence today in varying forms. Arguably the stereotype of black athletes as slothful and obtuse that Timothy Davis has attributed to conscious and unconscious racism can be traced, in addition, to stereotypes about the class of persons who engage in athletics. See Timothy Davis, *The Myth of the Superspace: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 643-52 (1995). The disproportionate representation of African-Americans in sports at all levels, and particularly group sports that don’t have economic hurdles to participation, may be traceable to racism’s dramatic effect in reducing blacks’ other economic options.

59. See HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 16-17 (noting that “the elaborateness of the arrangements for match games of base-ball, and the frequency of those contests

There was, however, another problem. Institutions found it increasingly difficult to control their own institutional actors—faculty, administrators, or those purporting to act on the institution's behalf, specifically alumni.

To appreciate fully these concerns, one must understand the vision of athletics that the amateur purists embraced. For purists, amateurism placed restraints not only upon students, but also upon the institutions themselves. Thus, they believed that institutions that held to the amateurism approach should not use athletic events for advertising or recruiting purposes.⁶⁰ The institution's obligation was to use athletics for its students' benefit, not its own. Thus, the original model for campus athletics to which many of those desiring to regulate athletics aspired was athletics available to all students, not athletics restricted to only the best players. Harvard's President Eliot argued:

When games are made a business, they lose a large part of their charm; and college sports cannot approach the professional standard of excellence without claiming the almost exclusive attention of the players, and becoming too severe, monotonous, and exacting to be thoroughly enjoyable. . . . Moreover, a high standard of excellence tends to make the number of persons who actually take part in athletic sports very small, the considerable number of tolerably good players being driven from the field, and reduced to the unprofitable position of mere lookers-on.⁶¹

For this very reason, purists favored restricting college and university involvement to intramural games, believing that the high level of competition that intercollegiate play required simply made it inconsistent with a purely amateur approach. This view would find its way into policy by 1906 when the NCAA, then a loosely-aligned organization of some thirty institutions,⁶² adopted a resolution stating as an ultimate goal the decrease in intercollegiate play and increase in intramural play.⁶³

The 1929 Savage report also harkened back to these two themes: that athletics should be available to all and that the intramural model was the best for educational institutions. Savage argued that adhering to the principles of amateurism was justified by the intellectual mission of the college.⁶⁴ He argued

in April, May and June . . . prompted this action," but that the inquiry took a comprehensive look at all sports).

60. See James Roscoe Day, *The Function of College Athletics*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 34, 35 (calling the fact that schools use athletics for advertising purposes a "notorious fact"); Waldo, *supra* note 39, at 46 (critical of "faculties and institutions who seek prominent [athletic] alliances for the sake of advertising and gate receipts").

61. HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 18.

62. See *infra* notes 100-01 and accompanying text.

63. PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE UNITED STATES 25-26 (1906) [hereinafter 1906 IAAUS PROCEEDINGS].

64. Savage wrote:

The presence of a man whose prime interest in college is dependent upon payment for

that the American college is a socializing agency and that rejecting professionalism was essential to "educational democracy," i.e., giving *all* students a chance to play athletics, not simply a select few.⁶⁵ (Of course, this reference to educational democracy as an American ideal was particularly ironic, given the widespread acceptance of undemocratic approaches when it came to the education of racial minorities and women.) Thus, Savage's report supported the vision of the university as a place where athletics did not stand apart from other university endeavors with unique significance, but was integrated into the complete education and made available to all.

Amateurism purists also believed that specialized recruiting for athletes was a violation of the amateur spirit. But on this subject in particular, institutions had great difficulty controlling their own actors, including alumni acting on their behalf. Often with support from institutional actors, alumni provided preferences, payments, and other gifts to outstanding athletes to recruit them or to lure them away from other institutions they might choose to attend.⁶⁶ Taking advantage of such an environment, some students transferred multiple times in order to take advantage of financial opportunities, thus earning the famous

his athletic services delays and reduces academic instruction to his intellectual level and speed, both in the classroom and in every other phase of college work. It invokes concessions at entrance and at every point at which an academic requirement is set. It leads in the direction of special privilege in tests and examinations, the relaxation of standards of grading in class and in written work, the granting of special opportunities to repair academic standing when it is injured by the close attention to athletic practice that subsidies entail, and much excusing from the obligation to meet academic appointments promptly and sincerely. It disunifies the student body and soon brings other undergraduates to feel that efforts to fulfill the intellectual purposes of the institution avail nothing if men are to be supported merely for the sake of winning games. No other force so completely vitiates the intellectual aims of an institution and each of its members.

SAVAGE, *supra* note 5, at 302.

65. Savage described "educational democracy" as "that characteristic of our educational process which vouchsafes to each and sundry equal opportunity to develop his habits and powers of the mind, the body or the spirit, in accordance with his capacities." Thus, he continued:

The effect of importing subsidized or professional athletes into any institution seriously impairs not alone the incentive, but also the privilege of every other student to develop to the full his interests and powers, intellectual, spiritual or physical. If college athletics have the socializing values that are attributed to them, then the infraction of the amateur convention usually gives to the man who possesses athletic talent, that he develops with a view to financial return, an advantage over his less skillful fellows which, because of the desirability of victory, destroys at one blow that democracy of the playing field and the river which is rightly numbered among the most precious merits of college sport.

Id. at 304.

66. *Id.* at 22-23; see also Myron T. Scudder, *The Influence of Collegiate Athletics on Preparatory Schools*, in PROCEEDINGS OF THE SIXTH ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 57, 58 (1911) [hereinafter 1911 NCAA PROCEEDINGS].

appellation “tramp” athletes.⁶⁷ Faculty and administrators sometimes acted to admit those with athletic prowess, even when they did not meet the academic standards for admission.⁶⁸

Fearing that athletics would defeat both amateurism and academics, institutional leaders concluded that one way to control athletics was take control of it away from students and to give that control to educators who could monitor the situation. The initial approach was to use faculty volunteers as coaches. When this obligation became too burdensome, some schools opted for alumni coaches with allegiance to the institution’s principles. But soon, many institutions began to hire paid coaches. Although a few schools hired athletic directors with faculty status, more commonly institutions employed contract coaches for only the relevant season with renewal possibilities and offered them no additional faculty rights.⁶⁹ The more successful of these non-faculty status coaches were able to command significant salaries as institutions competed for their talents.⁷⁰

Some pure amateurs viewed the very presence of paid “coaches” as itself a step toward professionalizing college athletics.⁷¹ Moreover, the idea of hiring coaches as faculty suggested they must be “athletics teachers,” an oxymoron in the minds of many academics. Even some of the institutions appointing full-time athletics teachers denied them faculty security through tenure, thus hindering any

67. See, e.g., Welsh et al., *supra* note 49, at 54-55 (referring to the “athletic tramp”).

68. Savage proclaims, “Admissions requirements were cut as the railroad cut rates.” See SAVAGE, *supra* note 5, at xvii; see also Waldo, *supra* note 39, at 45 (speaking of the “sporty professor” who does not care for ethical ideals).

69. See SAVAGE, *supra* note 5, at 22 (speaking of the 1880s and early 1900s). For more on the evolution of coaching, see BETTS, *supra* note 5, at 125; RIESS, *supra* note 5, at 124-26. In the 1920s, some colleges claimed that they had successfully integrated coaches into the fabric of the university. See PROCEEDINGS OF THE TWENTY-THIRD ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 20 (1928) [hereinafter 1928 NCAA PROCEEDINGS] (noting that coaches at Trinity College are assistant professors or instructors and “are paid by the college, and not by the athletic association”); *id.* at 21 (noting that all but one member of University of New Hampshire Athletic Department are regularly appointed faculty members and that all funding is handled through the business office of the college). By that time, some institutions had already established the position of athletic director. See *id.* at 19 (discussing Harvard’s establishment of position and his membership in the faculty of arts and sciences); *id.* at 42 (discussing a regional association for athletic directors.)

70. See James R. Angell, *Faculty Control of Athletics*, in 1923 NCAA PROCEEDINGS 74, 77 (referring to “expensive coaching staffs” in football and attempts to reduce coaching costs at Yale by making coaches faculty members paid on the same salary as regular faculty).

71. Thus, even as coaches seemed inevitable, opponents of “professionalism” tried to limit their involvement by insisting that coaches could only actively coach before and after games and could not direct players from the sidelines during a game. See, e.g., *College Baseball*, in 1911 NCAA PROCEEDINGS, *supra* note 66, at 8, 11 (noting that fifty-five colleges agreed with coaching limits, while thirty-five disagreed); *Report of Basketball Rules Committee*, in *id.* at 31 (noting that “coaching from the side lines has been almost entirely abolished from our college games . . .”).

possible integration of them into the fabric of the institution.⁷² Within the NCAA, conferences with sympathy to the pure amateurist's position sought to encourage their institutions to abandon the practice of affording coaches only seasonal contracts. In 1907, the First District of the NCAA reported that the New England colleges were very much opposed to the so called "professional coaches"—persons who offered their services to institutions for pay—and that Dartmouth had taken the lead hiring only alumni coaches.⁷³ By 1911, the University of Virginia had followed suit.⁷⁴

This writer believes that one can only truly appreciate this debate over coaching and athletics if one sees it as part of a larger multifaceted debate about the role of specialized training in educational institutions. Certainly, as noted earlier, there was unique resistance to recognizing athletics as a legitimate part of any educational program. That resistance had its own permutations, but it was also part of a larger debate over the legitimacy of formal training for *any* specialized trade or professional activity, including, for example, special training in law. In the late 1800s, the term "college" referred to the free standing liberal arts college while the term "university" encompassed many so-called practical training schools, like law schools, that undergraduates could attend *instead of college*.⁷⁵ Defenders of the colleges and the liberal arts tradition were noting an emerging pressure to offer professional training, an approach that they believed would dilute the very "learning-for-learning's-sake" approach that was considered to be the lifeblood of the liberal arts college.⁷⁶ Thus, amateurism

72. 1928 NCAA PROCEEDINGS, *supra* note 69, at 20 (Trinity College representative expressing doubt that coaches could be tenured there given the dependence on winning and losing); *see also* Thomas F. Moran, *Courtesy and Sportsmanship in Intercollegiate Athletics*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 64-66 (discussing different hiring approaches for coaches then used—professional coaches for the season, alumni coaches and coaches hired under short-term faculty contracts).

73. PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 7-8 (1907) [hereinafter 1907 IAAUS PROCEEDINGS].

74. *See* 1911 NCAA PROCEEDINGS, *supra* note 66, at 15.

75. *See, e.g.,* SCHMIDT, *supra* note 11, at 160; *see also* RUDOLPH, *supra* note 7, at 329-54. *See generally* SCHMIDT, *supra* note 11, at 146-67 (discussing the university movement); W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 73 (1997) (discussing law schools as undergraduate programs and the college/university dichotomy of the late 1800s).

76. The bias against professionalism helped create the separation of law from other undergraduate studies and its elevation to the status of a graduate program. Speaking of this opposition to the teaching of law, Christopher Columbus Langdell, a leader in the early law schools' movement, complained that American colleges held the view that liberal arts training served a greater public good, but professional training was pursued for selfish reasons and had no larger value and that a liberal arts degree prepared a man to pursue any course, while professional learning "is a thing to be 'picked up' by degrees, and acquired by experience and practice. . . ." *See* HARVARD COLL. ANNUAL REPORTS OF PRESIDENT AND TREASURER 79 (1880-81). These views, he argued, "have been inherited by American colleges, and have been as assiduously cultivated by

purists were also holding onto the historical liberal arts tradition when they asserted that a student should study athletics as an avocation, for its own sake, and not for money.

It is also important to note that the ability to press the position that one should pursue athletics without pay was closely tied to an institution's financial stability. Private institutions with substantial endowments or strong alumni bases had less need for the advertising and financial possibilities that athletics presented. Those targeting an elite and well-off student body did not have to consider seriously the financial impact of restricting pay for play upon students in need. On the other hand, state-supported schools, and others that lacked endowments, and those that catered to a more diverse student base, had reason to be more supportive of some financial assistance that would permit those athletes who were not in a position to earn academic scholarships to play sports without having also to take on a job to meet their financial needs. Thus, while most schools agreed that pay from outsiders for play should be prohibited, they disagreed on other aspects of amateurism, such as whether institutional athletic financial aid should be prohibited.

These political battles among institutions had a profound effect upon the institution's obligation to protect the welfare of the student under the *in loco parentis* doctrine, even as their control over athletics and student-athletes increased. As modern onlookers know, the theory that perceived abuses could be ended through institutional control of athletics proved flawed.

3. *Concerns for Student Safety?*—Student safety concerns also led institutional actors to consider intervention into athletics. In modern times, writers have suggested that football safety was a primary reason for the creation of the NCAA.⁷⁷ Football injuries certainly created the controversies that spurred educational institutions to national cooperation, but they were not the reason control of intercollegiate athletics was wrested from the students. Rather, the complete exercise of control over athletics was spurred by perceived threats to the gentleman amateur mission and the belief that greater control over athletics would allow an institution greater control over its actors.

However, it is true that in the formative years of campus football, student-run

them as by their English prototypes." *Id.* Thus, he complained, "[I]t is a common notion that the callings of professional men are of a commonplace, humdrum nature." *Id.* at 83; *see also* Carter, *supra* note 75, at 74.

Howard Savage, author of the 1929 Carnegie Commission report, opined that the yoking of the college with the graduate university resulted in the subordination of teaching to research, and the resulting "university" began to perceive of itself not merely as an agency for students to think hard and clearly, but also a place where one could, "without fundamental education," receive training in "all the vocations practiced in the modern state." SAVAGE, *supra* note 5, at viii-x. "It is under this regime," says Savage, "that college sports has been developed from games played by boys for pleasure into systematic professionalized athletics contests for the glory and, too often, for the financial profit of the college." *Id.*

77. *See, e.g.,* FALLA, *supra* note 5, at 13-15; *see also* NCAA Online, *History*, available at <http://www.ncaa.org>.

play was not above reproach and safety was a growing concern. Harvard students, for example, sponsored the annual "Bloody Monday" football game in which freshmen were sometimes violently pitted against sophomores. Under pressure from the townspeople, Harvard ultimately stepped in to ban the Bloody Monday activities in 1860.⁷⁸ In his 1893-1894 annual report, Harvard's President Eliot, a strong supporter of institutional control of athletics, observed generally of football that "[s]everal fatal accidents have happened this year to school boys and college students on the foot-ball field; and in every strenuous game now played, whether for practice or in an intercollegiate or other competition, there is the ever present liability to death on the field."⁷⁹ Fan behavior was also a concern for those events occurring on campus. As is the case today, athletic events were also occasionally marked by fan rowdiness, violence, and even gambling activity.⁸⁰

In fact, institutional involvement in intercollegiate athletics did not reduce injuries; instead, it expanded the fan base and the commercial value of the sport exponentially. By increasing game frequency and increasing the need to deliver spirited play, it also increased the potential for injury.⁸¹ In 1902, twelve deaths from football were reported across the nation.⁸² In 1905, football matches resulted in additional significant deaths and injuries.⁸³ These incidents were so disturbing that, in 1905, President Theodore Roosevelt called school athletics administrators together for consideration of what might be done to save lives and to save the game.⁸⁴ Still, the 1909-1910 season brought thirty-two deaths that newspapers claimed to be football-related, including the high-profile death of a West Point cadet in a game against Harvard.⁸⁵ In truth, not all of these matches were on college campuses nor did all involve college students, but many of the incidents involved educational institutions and thus, institutions suffered dearly in the press.⁸⁶

78. FALLA, *supra* note 5, at 5-6.

79. HARVARD COLL., ANNUAL REPORTS OF THE PRESIDENT & TREASURER 17 (1893-1894) [hereinafter HARVARD ANNUAL REPORT 1893-94].

80. See BETTS, *supra* note 5, at 220-24.

81. See Arthur G. Smith, *Conference Direction and Control of Athletics in the Middle West*, in NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE FIFTH ANNUAL CONVENTION OF THE NCAA 55, 56 (1910) (noting that when students controlled games, life was simpler and the introduction of the institution commercialized intercollegiate athletics).

82. See BETTS, *supra* note 5, at 127.

83. *Id.*

84. *Id.* at 127.

85. See *Report of the Football Rules Committee*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 18, 19. Some legislatures were apparently considering making football a crime. See *Football Reform*, in 1909 IAAUS PROCEEDINGS, *supra* note 45, at 24, 25.

86. See, e.g., *Football Reform*, *supra* note 85, at 27 (asserting that of those killed in 1909, not all were college students and not all deaths could fairly be attributed to football and also charging the press with sensationalizing football death and injury stories).

D. Countervailing Concerns: The Perceived Financial Value of Athletics

Despite their discomfort with sport, many institutions also recognized that affiliating themselves with sporting events had tremendous value in an ever-competitive and increasingly expensive world. To those willing to take advantage, such events offered free advertising (and, consequently, increased tuition yields), strong alumni and community loyalties, and favorable press attention.

Retreating from athletics was not easy even for those institutions most committed to the intramural model and amateurism ideals. Indeed, the public fervor supporting athletics was tremendous and widespread, and interfering with that fervor was not to make the institution a popular actor. Thus, in 1895 Harvard's Eliot unhappily observed that student participants could not be blamed for the problems with sport, for they were "swayed by a tyrannical public opinion—partly ignorant, and partly barbarous—to the formation of which graduates and undergraduates, fathers, mothers, and sisters, leaders of society, and the veriest gamblers and rowdies all contribute."⁸⁷ By the early 1900s, editors at newspapers across the nation had already begun the practice of selecting the "national champion" from among the best college teams.⁸⁸

Football became by far the most popular sport among the public and a significant moneymaker for its sponsors. Riess reports that between 1888 and the 1890s, gate receipts at Yale football games jumped from a mere \$2800 to \$50,000, surpassing all other sports.⁸⁹ One 1915 NCAA district report found that in that district, comprised of Ivy League schools, football admissions were three times that of baseball and eight times that of track and field and that football made up more than seventy percent of all gate receipts.⁹⁰ The prospect of charging the public for witnessing such events increased its value to educational institutions which, much like today, were always in need of more funds.⁹¹ Powerful alumni also supported football programs and tied their dollars to its

87. HARVARD ANNUAL REPORT 1893-94, *supra* note 79, at 16-17.

88. 1908 IAAUS PROCEEDINGS, *supra* note 39, at 13 (decrying the media's practice of having editors across the nation vote on a national champion in intercollegiate athletics and "flaunting [the selection] before the college world"); *see also* 1907 IAAUS PROCEEDINGS, *supra* note 73, at 11-13 (noting earlier media critiques of institutions that used games for advertising and gambling purposes, but complaining of sympathy toward professionalism on the part of many "metropolitan papers"); Smith, *supra* note 81, at 57 (regarding press attention to individual student-athletes, noting that publicity is a "windy diet for a young colt").

89. RIESS, *supra* note 5, at 121.

90. NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE TENTH ANNUAL CONVENTION OF THE NCAA 11-12 (1915). The report notes that for all sixteen colleges in the conference, including Harvard, Yale, and Dartmouth, total receipts were \$544,000 and football brought in \$395,000 of that amount. *Id.*

91. *See* FALLA, *supra* note 5, at 9 (mentioning gate receipts in the 1880s); SAVAGE, *supra* note 5, at xxi (noting that for several schools in the 1920s the annual income from gate receipts exceeded \$100,000).

continuance.⁹² Opportunities to participate in or observe sport were likely also marvelous student recruiting tools. However, athletics were also expensive. Betts reports that in 1914, Harvard reported spending \$160,000 on varsity athletics, Cornell reported \$75,000, and Wisconsin \$45,000. Most of these expenditures went to football.⁹³

In these earliest days, football, more than any game, underscored the conflict of interest that the alleged parent (the institution) had in fulfilling its obligations to the alleged child (the student). The safety of students was severely jeopardized by a game growing increasingly violent, even as institutional involvement increased with a charge to make it less so. Negative press attention to football deaths—often in the context of institutional involvement—put extreme pressure on institutions because it threatened their public relations. At the same time, positive sports press attention on the game made it difficult to withdraw entirely.

Considered in light of the *in loco parentis* doctrine, the decision to regulate student activity in the sporting arena was different from other decisions a school might make affecting student lives. Athletics pitted institutional obligations to protect student welfare against an emerging institutional interest in financial gain and publicity through athletics. This conflict of interest, arguably, created the environment that inevitably led to a perversion of the *in loco parentis* doctrine.

E. Exercising "Control"

The story of institutional involvement in control of athletics, particularly intercollegiate athletics, is a story of varied approaches ultimately reaching a crescendo of institutions in a national organization, the NCAA.⁹⁴ Before the NCAA's creation, institutions tried to take control through creating campus faculty committees with jurisdiction over athletics. Sometimes these committees would have alumni and student representation as well.⁹⁵ Support emerged for the

92. See, e.g., 1907 IAAUS PROCEEDINGS, *supra* note 73, at 9 (speaking of "conspiracy" of "some alumni of one institution to run in four or five football players"); Luther H. Gulick, *Amateurism*, in *id.* at 40, 41-42 (speaking of alumni willingness to finance student-athlete studies in order to have them play for the favored institution); Waldo, *supra* note 39, at 40-41 (referring to alumni who "oppose and thwart college faculties in their control of students and student activities" and noting that "[w]hen the rich and influential alumnus happens to be a sporting man, . . . his control is often decisive and usually malign").

93. BETTS, *supra* note 5, at 130.

94. Practically all four-year institutions belong to the NCAA. Two-year institutions have their own organization, the National Association of Intercollegiate Athletics (NAIA). See www.naia.org.

95. See, e.g., CATALOGUE OF THE UNIVERSITY OF SOUTH CAROLINA: 1907-1908, at 86 (noting that "[i]n 1896 the Board of Trustees adopted a resolution" giving faculty express power to determine the rules under which students of the University were to "be permitted to engage in athletic games"). South Carolina opted for an advisory committee consisting of two faculty, two alumni and two students. *Id.*; see also HARVARD COLL., REPORT, 1888, REPORT OF SPECIAL

creation of leagues or associations in which schools met to jointly set rules for themselves and their competitors.⁹⁶ From such groups emerged the "conferences" first formed in the 1890s.⁹⁷ These conferences served as rulemaking bodies for their members and soon became the primary rulemaking bodies for intercollegiate activity, essentially replacing local faculty control in that arena.

A national movement to regulate amateur athletics first began outside the colleges with the formation of groups by city athletic clubs. Among these, one of the most viable organizations was the Amateur Athletic Union ("AAU"), formed in 1888 by the New York Athletic Club.⁹⁸

Then, in the bloody football season of 1905, the same year that President Roosevelt sounded the alarm,⁹⁹ Chancellor Henry McCracken of New York University issued a call to college presidents after a student was killed in a football game involving his institution. At its first official meeting in 1906, the group adopted the name the Intercollegiate Athletic Association of the United States (IAAUS). In 1910, it changed its name to the NCAA.¹⁰⁰

McCracken's group of thirty institutions agreed "severally" to take control

COMMITTEE ON ATHLETICS, ANNUAL REPORT (1888) (report of faculty committee on athletics issues). See generally Waldo, *supra* note 39 (regarding the need for faculty control).

96. For example, Harvard convinced Brown, Dartmouth, and Princeton to join with them in prohibiting baseball games with professional clubs. Yale reportedly declined to join in the proposed alliance at that time. HARVARD ANNUAL REPORT 1881-82, *supra* note 15, at 17; see also Agreement with Yale, Eligibility for Athletic Teams Fixed By New Set of Rules, Harvard Bulletin, Mar. 18, 1903. A group containing many of these same schools and a few others formed the football rules committee in 1905. See 1906 IAAUS PROCEEDINGS, *supra* note 63, at 22. The NCAA formed its own football rules committee without these schools in 1906. *Id.* The two groups were merged in 1909. 1909 IAAUS PROCEEDINGS, *supra* note 45, at 18.; see also 1907 IAAUS PROCEEDINGS, *supra* note 73, at 18 (discussing NCAA measures toward amalgamation).

97. See RIESS, *supra* note 5, at 124 (noting the establishment of the Southern Inter-Collegiate Association in 1894, and later the Inter-Collegiate Conference of Faculty Representatives and other conferences). Attending at the first intercollegiate conference meeting were representatives from Chicago, Illinois, Michigan, Minnesota, Northwestern, Purdue and Wisconsin. This conference was known at various times as the "Big Nine," Chicago Conference, and later, as the "Big Ten." Occasionally, its founding date has been reported as 1896. The conferences preceded the NCAA and in that latter organization's infancy, they in fact possessed the key regulatory power, not the national organization. The reports of the various NCAA divisions reflect their impact. See 1907 IAAUS PROCEEDINGS, *supra* note 73, at 9-10 (noting that a number of Southern colleges have joined and agreed to conduct their activities according to the Southern Intercollegiate Athletic Association's rules).

98. See BETTS, *supra*, note 5, at 110.

99. See *supra* note 84 and accompanying text.

100. Palmer E. Pierce, *The Intercollegiate Athletic Association of the United States*, in PROCEEDINGS OF THE FIFTH ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 38 (noting the change to "NCAA" was to "secure a more distinctive name" reflecting its national character).

over the intercollegiate athletics movement.¹⁰¹ Article VII of the IAAUS Constitution stated: "The Colleges and Universities enrolled in this Association *severally agree to take control of student athletic sports*, as far as may be necessary, to maintain in them a high standard of personal honor, eligibility, and fair play, and to remedy whatever abuses may exist."¹⁰² The group's insistence that the agreement was "several" underscores that these institutions were not yet prepared to cede their sovereignty to a central organization. It would be nearly five more decades before the newly-created NCAA gained the power to enforce legislation against members and even more years before it would become the powerful central organization so well known to those who monitored amateur athletics issues between the 1950s and 1990s.¹⁰³ A decision was also made to limit the NCAA's primary membership to academic institutions. Indeed, invitations from the AAU to affiliate were rebuffed.¹⁰⁴

As noted earlier, schools claiming to embrace pure amateurism initially wanted no part of intercollegiate athletics. After realizing that other institutions were marching into that world without them, they joined the march. The fellow institutional travelers who made up the college and universities of this era were a diverse group. The Midwest had experienced a substantial growth in new educational institutions, and Southern institutions were still recovering from the financial and structural devastation of the Civil War. The student-athletes that the infant NCAA had to consider were not merely the sons of the wealthy. This diversity, which would increase as NCAA membership grew, would eventually yield a splintering of the NCAA into subdivisions representing different intercollegiate athletics philosophies.¹⁰⁵ Still, the institutions of this era had one thing in common: none seriously questioned the institution's right to control student-athlete behavior under the *in loco parentis* banner.

101. Thirty institutions listed themselves as original NCAA members that had ratified the organization's constitution: Allegheny, Amherst, Bucknell, Colgate, Dartmouth, Denison, Dickinson, Franklin and Marshall, George Washington, Grove City, Haverford, Lehigh, Miami University, New York University, Niagara, Oberlin, Ohio Wesleyan, Rutgers, Seton Hall, Swarthmore, Syracuse, Tufts, Union, University of Colorado, University of Minnesota, University of Missouri, University of Nebraska, University of North Carolina, University of Pennsylvania, University of Rochester, University of Wooster, West Point, Vanderbilt, Washington and Jefferson, Wesleyan, Westminster, Williams, and Wittenberg. 1906 IAAUS PROCEEDINGS, *supra* note 63, at 11. Several other colleges were also in attendance as observers.

102. IAAUS CONST. art VIII, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 31 (emphasis added).

103. For a discussion of this evolution, see Carter, *supra* note 4, at 39-59.

104. See 1906 IAAUS PROCEEDINGS, *supra* note 63, at 24-25 (noting correspondence from the AAU proposing a national intercollegiate association that is allied with the AAU); 1907 IAAUS PROCEEDINGS, *supra* note 73, at 14 (recommending that NCAA not play with any classes of teams operating under AAU rules and asserting the rules were inappropriate for college players).

105. See *infra* notes 176-81 and accompanying discussion.

F. The Means: Institutional Control and Eligibility

A key question that these early founders considered was how control over athletics might best be exercised. To answer the question, the NCAA and other regulators certainly embraced principles of institutional control, that is, the idea that the institution through its faculty or president, and not students, should be in charge of intercollegiate athletics.

However, institutions were also aware that taking a hard stance against institutional actors, including alumni acting on the behalf of institutions, could yield financial and political repercussions. Thus, this writer believes that this fact presented a practical dilemma for regulators, one that led NCAA founders to conclude that controlling the student participant was also necessary path of least resistance. Of course, students did not sit on faculties, nor were they college presidents or alumni. They did not determine financial aid or admissions policies. Students did not control the institutional actors who jeopardized institutional values. Still, student control was the path of least resistance and consequently, an effective way to monitor athletics programs even when administrators and faculty could not be controlled. The *in loco parentis* doctrine provided a perfect springboard for broad controls over student athletic involvement. Using this doctrine, schools sought to dictate to their students that if they wished to play intercollegiate athletics, they must, at every level prior to and including college, pursue it as “gentlemen amusing themselves” and not as professionals seeking to earn payment or to gain a reputation.

The NCAA adopted this approach in 1906 setting forth aspirational rules for its members. Article VI contained “Principles of Amateur Sport” in which the NCAA rejected, among other things, specialized recruiting and athletically-based financial aid. Specifically, article VI read:

Principles of Amateur Sport

Each institution that is a member of this Association agrees to enact and enforce such measures as may be necessary to prevent violations of the principles of amateur sports such as

a. Proselyting [sic]

1. The offering of inducements to players to enter Colleges or Universities because of their athletic abilities, and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly.

2. The singling out of prominent athletic students of preparatory schools and endeavoring to influence them to enter a particular College or University.

b. The playing of those ineligible as amateurs.

c. The playing of those who are not bona-fide students in good and regular standing.

d. Improper and unsportsmanlike conduct of any sort whatsoever, either on the part of the contestants, the coaches,

their assistants, or the student body.¹⁰⁶

While reserving the right of institutions to determine the specific methods of prevention of violations for the principles set forth in Article VI, Article VII suggested "eligibility" rules to affirm the principles. These rules:

1. Required full time enrollment for student participation;
2. Limited transfers by student athletes from school to school by requiring, *inter alia*, that they have been in residence at least one year before participation;
3. Prohibited anyone who had received pay for play from playing on a team or offering services as a "trainer" or "instructor";
4. Prohibited anyone who had received pay for play from participation in intercollegiate competition;¹⁰⁷
5. Essentially denied participation to graduate students by limiting eligibility to four years;
6. Barred freshmen from play;
7. In football only, specifically requiring class attendance by declaring that "[a]ny football player who has participated . . . and leaves without having been in attendance two-thirds of the college year in which he played shall not be allowed to play as a member of the team during the next year's attendance at the same institution."

The principles further provided that "[c]andidates for positions on athletic teams shall be required to fill out cards, which shall be placed on file, giving a full statement of their previous athletic records"¹⁰⁸ The NCAA provided a list of questions and the student was required to swear to his answers as follows: "On my honor, as a gentleman, I state that the above answers contain the whole truth, without any mental reservation."¹⁰⁹

Institutions also took steps to attempt to swell the tide of injuries. The NCAA established a football rules committee to standardize the game and to work with other existing rules committees toward the passage of rules prohibiting dangerous play.¹¹⁰ They sought to spur a professional corps of officials to

106. IAAUSBY-LAWS art. VI, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 33.

107. Ironically, this bylaw presumed that payment of training table expenses (special board provisions for student-athletes) could be allowed, but limited them to not more than the regular board of a player. *See* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 34.

108. IAAUS BY-LAWS art. VII, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 35; *see also* FALLA, *supra* note 5, at 25.

109. IAAUS BY-LAWS, art. VII, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 36.

110. IAAUS BY-LAWS art. V, *reprinted in* 1906 IAAUS PROCEEDINGS, *supra* note 63, at 33. Institutions other than the NCAA also tried to curb football injury. *See, e.g., id.* at 25-26; Ronald A. Smith, *Harvard and Columbia and a Reconsideration of the 1905-06 Football Crisis*, 8 J. Sports History 5 (1981); James S. Watterson, III, *The Football Crisis of 1909-10: The Response of the Eastern "Big Three"*, 8 J. SPORT HIST. 33 (1981).

enforce those rules.¹¹¹

Because the NCAA had no power to enforce its own rules and was not yet even recognized as a national legislative power, it was careful not to promulgate too many rules. However, the conferences were legislative bodies and, by this time, had already begun rulemaking. Changes instituted by some in these early days included: local or regional prohibitions on intercollegiate play by freshmen, one-year residence rules limiting transfers, rules limiting intercollegiate play to undergraduates only, limitations on practice periods, and an end to training tables, which separated athletes from other students for eating but provided meals.¹¹²

Thus, institutions concluded that the best means for gaining control over intercollegiate athletics was to assume institutional control over athletics. This was done by claiming intercollegiate athletics as a kind of institutional property to which students could have access or "eligibility" only if they abided by certain rules. The *in loco parentis* doctrine played a key role in these institutional efforts. It provided the social and legal grounds for exercising broad controls over students in the name of preserving their charges as gentleman amateurs. At the same time, this traditional model of amateurism also imposed an obligation upon the institution to avoid commercialization of athletics and to operate athletics programs for student-athlete welfare.

The *in loco parentis* doctrine continued thereafter to affect the way that athletic institutions viewed the rights of student-athletes. A romantic version of the college or university as superparent, with the ability to even outthink the natural parent, is expressed in following comments at the 1935 NCAA convention.

Our primary interest is in the boy. When his parent turns him over to the school, or to the college, it represents, in my mind, one of the greatest acts of trust and faith that a man can make, because, however incoherent the parent may be, however incapable he may be of putting into precise words in his talks with us what it is that he wishes us to do for the boy, we know what he wishes. We are not dependent upon his statement. He wishes us to take that boy and to give him, on every side of his life, the kind of training that will fit him for intelligent, disciplined, generous manhood and strong citizenship in this country. That is what he wishes. He wishes us to realize for him all his hopes in the boy who bears his name and who is to follow in his footsteps.

There can be no greater act of faith, no greater act of trust, gentlemen, than that¹¹³

111. *But cf.* HARVARD ANNUAL REPORT 1893-94, *supra* note 79, at 17 (rejecting view "often said" that by "employing more men to watch the players, with authority to punish instantly infractions of the rules, foul and vicious playing could be stopped").

112. *E.g.*, 1906 IAAUS PROCEEDINGS, *supra* note 63, at 18-19 (discussing various rules relating to these points in the Western and Ohio Conferences).

113. NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE THIRTEENTH ANNUAL

However, there was a darker side to control. The financial interests of institutions in athletics challenged the trust inherent in the *in loco parentis* doctrine and undercut its welfare leg. The conflict between the institution's financial interest in perpetuating sport and its interest in protecting the welfare of the athlete continued to drive a wedge between parent and child as the commercial value of athletics and the pressure to grow athletics programs continued to rise.

II. THE DEATH KNELL FOR *IN LOCO PARENTIS*

Ironically, even as educational institutions were exercising more and more control over student-athletes, the application of the *in loco parentis* doctrine was waning as it applied to the larger student body.

A. *The General Student Body*

As the decades progressed, courts began to cut back on all three legs of the *in loco parentis* doctrine as it applied generally to colleges and universities. The student led campus protests of the 1960s and other instances of student rebellion against authority forced a new conception of the relationship between the student and the university. A number of court decisions confirmed that students of all ages were entitled to First Amendment protections, including freedom of speech and associational rights.¹¹⁴ Indeed, the U.S. Supreme Court called the university classroom "peculiarly the 'marketplace of ideas.'"¹¹⁵ The courts also declared

CONVENTION OF THE NCAA, at 10 (1935) [hereinafter 1935 PROCEEDINGS].

114. In 1969, the Supreme Court determined in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that high school students had a right in the First Amendment to the U.S. Constitution to wear black armbands in quiet protest of the Vietnam war. *Id.* at 514; see also *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (finding that public school board may have violated First Amendment by barring library books approved by teachers and parents); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (holding that university expulsion of student after she distributed campus publication allegedly containing indecent words was improper because it constituted the dissemination of ideas, though perhaps not in good taste).

Although the courts have recognized that narrowly tailored limitations on speech may be appropriate in some cases, in the educational context these limited instances tend to be where the need for discipline is important, where there is fear that the speech will interfere with the educational mission (as with pre-college students), or where there are significant concerns that the speech may jeopardize public order and safety.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. This amendment applies to the states under the Due Process Clause of the Fourteenth Amendment. See, e.g., *Pico*, 457 U.S. at 855 n.1.

115. *Keyishian v. Bd of Regents*, 385 U.S. 589, 603 (1967); see also *Pickering v. Bd. of*

that publicly-funded universities could not expel students without affording them some measure of due process¹¹⁶ or subject them to unreasonable searches and seizures.¹¹⁷

These court decisions also reflected an emerging distinction between college and university students on the one hand and younger students on the other—a distinction not present at the time of Alice's error and the *Tanton* decision. The Supreme Court explicitly recognized that college students are, generally speaking, "young adults" and thus "less impressionable than younger students" and not in need of shielding.¹¹⁸ While holding on to the doctrine with regard to young children, the courts jettisoned the *in loco parentis* doctrine as applied to college and university students, replacing it instead with a vision of the relationship based upon contract.¹¹⁹

While these constitutional pronouncements related to publicly-funded institutions, private institutions were not untouched by the revolution. In the wake of campus crackdowns on student protests, the Carnegie Commission on Higher Education published in 1971 a report and recommendations urging colleges and universities, both private and public, to take steps to protect student and faculty speech rights as essential to an academic community.¹²⁰ As a result, educational institutions across the country adopted a statement of student rights, which recognized for students at private institutions the same student freedoms that were at issue in litigation involving publicly funded ones. Accrediting agencies began to require similar institutional protections of academic freedom and some form of due process for faculty and students before affixing their

Educ., 391 U.S. 563 (1968) (upholding First Amendment free speech right of public high school teacher to criticize school board and superintendent).

116. E.g., *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (requiring due process in expulsion cases); *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969); *cf. Buttomy v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) (rejecting *in loco parentis* doctrine in university setting); *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal. Rptr. 463, 470 (App. 1967) (also rejecting *in loco parentis* doctrine in university setting).

117. *Morale v. Grigel*, 422 F. Supp. 988, 997 (D. N.H. 1976) (regarding unauthorized and involuntary search of student's dormitory room, the court held that "[a] college cannot, in this day and age, protect students under the aegis of *in loco parentis* authority from the rigors of society's rules and laws, just as it cannot, under the same aegis, deprive students of their constitutional rights").

118. *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981). *Widmar* involved religious speech, but the Court was rejecting the idea that if religious speech took place within the university, students might misinterpret the message's content as in fact approved of by the university, and that students needed to be protected from that misimpression.

119. See, e.g., *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 554 (3d Cir. 1984) ("Unlike a university, where it is generally understood that a student is, with reason, responsible for the conduct of his or her own affairs, the behavior of a high school student is subject to the constant regulation and affirmative supervision of adult school authorities."), *cert. granted*, 469 U.S. 1206 (1985), *vacated*, 475 U.S. 534 (1986).

120. See CARNEGIE COMM'N ON HIGHER EDUC., DISSENT AND DISRUPTION (1971).

stamps of approval.¹²¹ Federal law also had an impact on public and private colleges, as many were made vulnerable to federal laws affecting student rights by virtue of their receipt of federally-funded student financial aid.¹²²

Ironically, institutions too played a key role in curbing the doctrine's applicability to the larger student body. As they faced unprecedented litigation over liability for student injuries, institutions themselves began to call for a reduction of their responsibilities under the *in loco parentis* doctrine, particularly in the area of tort law. Courts responded by rejecting tort claims by parents alleging that institutions had breached a duty to monitor their children or others who had harmed them.¹²³

121. See, e.g., COMM'N ON COLLS., S. ASS'N OF COLLS. & SCH., CRITERIA FOR ACCREDITATION, Standard 5.4.3.3, at 61 (1996) [hereinafter S. ASS'N] (requiring institutions to publish and make available "a statement of student rights and responsibilities" and to outline clearly the disciplinary procedures), available at www.sacscoc.org (Principles of Accreditation); W. ASS'N OF SCH. & COLLS., HANDBOOK ON ACCREDITATION 18, 127 [hereinafter W. ASS'N] (imposing similar requirement), available at www.msache.org/pubs.html. Moreover, accrediting criteria also anticipate a community that tolerates free speech. See, e.g., MIDDLE STATES COMM'N ON HIGHER EDUCATION, CHARACTERISTICS OF EXCELLENCE IN HIGHER EDUCATION: STANDARDS FOR ACCREDITATION 4-6 (requiring "integrity in the institution's conduct of all its activities through humane and equitable policies dealing with students, faculty, [and] staff and defining integrity as presupposing academic freedom and intellectual freedom"); S. ASS'N, *supra*, Standard 4.8.6, at 50 (requiring that faculty and students "be free to examine all pertinent data, question assumptions, be guided by the evidence of scholarly research and teach and study the substance of a given discipline"); W. ASS'N, *supra*, at 18 (dictating that institution must publicly state commitment to academic freedom).

122. See, e.g., *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (affirming lower court holding that private educational institution that received no direct federal funding was subject to Title IX, including its athletic programs, because its students received federal financial aid that eventually reached the institution).

123. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979) (finding college not liable to student passenger where student driver became intoxicated at campus picnic and later had car accident); *Lloyd v. Alpha Phi Alpha Fraternity*, No. 96-CV-348, 97-CV-565, 1999 WL 47153 (N.D.N.Y. Jan. 26, 1999) (finding university not liable for pledge's injuries because it had no duty to control university sanctioned fraternity and no knowledge of its activities); *Albano v. Colby Coll.*, 822 F. Supp. 840 (D. Me. 1993) (holding that college had no duty to prevent twenty-year-old student from becoming intoxicated and causing harm to himself); *Hartman v. Bethany Coll.*, 778 F. Supp. 286 (N.D. W. Va. 1991) (stating that college had no duty under *in loco parentis* doctrine and had not been negligent in case in which seventeen-year-old female student was attacked by two male associates she met at a bar); *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993) (holding that university-student relationship did not alone impose a duty to protect sexually assaulted student from acts of fellow students or third parties, although landlord-tenant relationship could do so); see also Stamatakos, *supra* note 14, at 474; Robert D. Bickel, *A Brief Comment About the Law's Unique Relationship to Postsecondary Education*, 27 STETSON L. REV. 115, 115-16 (1997).

Still, the courts have recognized that colleges have some obligation to provide a safe campus, but again the activities in question are those that could cause actual physical harm, not simply moral

Instead of the higher duty found in *in loco parentis*—the duty inherent in the welfare arm—the courts found instead that schools would be judged by ordinary negligence standards. The courts rejected the doctrine even in cases in which the student whose behavior or safety was at issue was under the age of majority.¹²⁴ It has been argued that at least where student safety is concerned the doctrine has met with a recent revival.¹²⁵ However, these cases may reflect only a moderate retreat; it is clear that in all other areas—except for athletics of course—the doctrine is essentially dead.

B. Student-Athletes: On the Fringes of the Revolution

Student-athletes were often involved in the student-led campus protests that led to the general expansion of rights for students and of civil rights in general. Their efforts helped to end segregation in both athletic and nonathletic aspects of college and university life.¹²⁶ For many purposes, the athletic departments of colleges and universities continued to treat student-athletes the way they had always treated them. Thus, while receiving benefits designed to make them beholden to athletics, student-athletes did not gain all of the new, broader rights that the revolution brought to other students, or gained them far more slowly. Before considering the divergence of student-athlete rights from the larger student body's rights, it is useful to consider the "why" of this phenomenon. The reason for the divergence, I argue, was institutional bifurcation.

C. Institutional Bifurcation as the Reason Why Student-Athletes Did Not Gain an Expansion of Rights

The reason that student-athletes did not gain the broad expansion of rights that non-athlete students gained in the 1960s and 1970s is that, by that time, athletics had been separated out from the larger life of institutions and was operating under its own set of rules. Many educational institutions with intercollegiate athletic programs had become, in effect, bifurcated institutions.

behavior. See Hirshberg, *supra* note 14 (claiming a partial re-emergence of the *in loco parentis* doctrine); see also *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (finding jury question as to whether college had proper safety precautions in place to aid student-athlete suffering cardiac arrest when engaging in athletics for which he was recruited). The notion of such responsibility is also embraced in the Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (2000)).

124. See, e.g., *Booker v. Lehigh Univ.*, 800 F. Supp. 234 (E.D. Pa. 1992) (finding that college not liable when underage student injured herself through alcohol self-indulgence), *aff'd*, 995 F.2d 215 (3d Cir. 1993); *Hartman*, 778 F. Supp. at 294 ("A College does not stand *in loco parentis* to its seventeen year old college freshmen.").

125. See Hirshberg, *supra* note 14, at 190-91.

126. This activism of black athletes in particular has been chronicled. See, e.g., HARRY EDWARDS, *THE REVOLT OF THE BLACK ATHLETE* (1969); see also JACK SCOTT, *THE ATHLETIC REVOLUTION* (1971).

This trend began very early on when institutions hired professional coaches but declined to integrate them into the faculty. Out of this environment emerged the "training tables" where athletes dined separately from other students, as well as, on some campuses, separate living quarters for athletes.¹²⁷ By the mid-1900s it was common for institutions not to include athletics income and expenditures in the overall college or university budget reports, but rather to account for it separately and even privately to avoid scrutiny.¹²⁸ The need for such creative accounting grew greater as institutions strained under the pressure to expand their athletic programs through new stadia that were beyond the institutions' means.¹²⁹ The financial strain on institutions was heightened by the effect of the Great Depression in the 1930s and the military draft, which siphoned away many of the ablest student-athletes for military service. Thus, in the 1970s the Raiborn report would conclude that contrary to the public image of athletics as a self-sustaining institutional program, even one that made non-revenue programs possible, the majority of institutions with athletic programs were operating their athletic departments in the red due to rising coaches salaries and athletics program costs.¹³⁰ The passage of Title IX in the 1970s added to this pressure. Under Title IX, educational institutions receiving federal funds had to ensure gender equity in men's and women's athletics programs. Not surprisingly, many educational institutions resisted the application of Title IX to their athletic programs, then predominantly serving males, although they conceded that other educational programs were subject to it.¹³¹ In 1985, the NCAA passed a constitutional

127. 1906 IAAUS PROCEEDINGS, *supra* note 63, at 18-19 (noting that training tables were forbidden in the Western and Ohio Conferences); 1907 IAAUS PROCEEDINGS, *supra* note 73, at 8 (suggesting that training table concept may soon lose appeal among New England colleges); *id.* at 16 (training table done away with in Missouri Valley Conference).

128. In 1997, the NCAA passed Bylaws 6.2.1. and 6.2.2 requiring that athletic department budgets "be controlled by the institution and be subject to its" normal budgeting procedures or be approved by the CEO of the institution. 1996-97 NCAA MANUAL.

129. See, e.g., PROCEEDINGS OF THE TWENTY-NINTH ANNUAL CONVENTION OF THE NCAA 32 (1934) [hereinafter 1934 NCAA PROCEEDINGS] (stating that some schools in Sixth District were "financially embarrassed" because of efforts to maintain athletics beyond their means); *id.* at 42 (noting that Eighth District schools most frequently listed finances as major problem in athletics). In 1928, Brown University reported building a \$750,000 gymnasium; the Third District reported that its schools were "imitating" others in "building stadia within their means." See 1928 NCAA PROCEEDINGS, *supra* note 69, at 18, 28.

130. MITCHELL H. RAIBORN, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETIC PROGRAMS: ANALYSIS OF TRENDS AND RELATIONSHIPS, 1970-77 (1978).

131. See, e.g., *Grove City Coll. v. Bell*, 687 F.2d 684, 696-700 (3d Cir. 1982) (noting that educational institutions are treated as single entities under Title IX, including their athletic programs, and citing congressional hearing testimony noting that objections to the inclusion of athletics are directly against the spirit of Title IX), *cert. granted*, 459 U.S. 1199 (1983), *aff'd*, 465 U.S. 555 (1984); see also U.S.C.A. §§ 1681-1688 (West 1999 & Supp. 2002). So far the NCAA itself has been held to be not subject to Title IX. E.g., Thomas M. Rowland, *Level the Playing Field: The NCAA Should Be Subject to Title IX*, 7 SPORTS LAW. J. 143, 144 (2000).

amendment requiring that athletic department budgets be controlled by the institution and be subject to normal budgeting processes,¹³² but years of special treatment of athletics had already created a bifurcation of interests between the athletic department on the one hand, and the rest of the institution on the other.

The failure of educational institutions either to embrace or reject intercollegiate athletics as an academic endeavor created an environment that was ripe for bifurcation. This writer believes that six additional factors also contributed to it

1. *The Insecure Career Status of Coaches.*—The battle between adherents to the liberal arts tradition and those who favored practical training led to the insecure and segregated status of coaches in institutions, which, in turn, helped to make bifurcation possible. Any institutional allegiance that could have been fostered among coaches was stymied, because not only did institutions generally not offer coaches tenure, they fired coaches who failed to deliver a winning record. At the same time, institutions refused to reject coaching and intercollegiate athletics outright. The precarious status of coaches forced those with the primary responsibility for ensuring student welfare to consider their own job security and, contrary to the *in loco parentis* doctrine, to choose actions which increased that security through winning, even when such actions were contrary to student welfare. Moreover, the insecure status of coaches encouraged them to seek out avenues for promotion that were outside of the university structure.

2. *The End of General Faculty Involvement in Athletics.*—At the first NCAA meeting in 1906, the role of attendees was dominated by faculty not specializing in athletics and general administrators.¹³³ However, by the 1930s, presidents, administrators, and faculty in traditional disciplines had virtually disappeared, replaced by those whose work was teaching and training in athletics.¹³⁴

The reduction of CEO and non-athletic faculty involvement and specialization in coaching may have been inevitable given the growth of athletics and, perhaps, was even a good thing if institutionally-run intercollegiate athletics was to survive. Certainly, the emergence of professional associations among coaches helped to provide some standards, albeit voluntary ones.¹³⁵ But the distancing of mainstream faculty and the lack of job security of athletics personnel also resulted in a conflict of interest because those with a direct

132. See 1988-89 NCAA MANUAL 18. This language was subsequently translated into Bylaw 6.2.1 in the 1989-1990 manual.

133. 1906 IAAUS PROCEEDINGS, *supra* note 63, at 7-9 (displaying list of delegates; most delegates bear the title of "Professor," a title not given to coaches or athletics directors at that time). In contrast, Alonzo Stagg, athletic director at the University of Chicago and a visiting delegate, is listed as "Director" Stagg. *Id.*

134. See also 1935 PROCEEDINGS, *supra* note 113, at 103 (lamenting the small number of presidents and deans at the meetings).

135. Early on, the conferences initiated annual coaches meetings. See, e.g., 1911 PROCEEDINGS, *supra* note 66, at 21, 32 (referring to meetings regarding sportsmanship and eliminating distrust among coaches).

financial interest in perpetuating intercollegiate athletics and in growing programs larger also had the primary responsibility for overseeing student-athlete welfare.

3. *Radio, Television, and Media Attention.*—As noted earlier, college athletics generated enormous public attention from the earliest days of its arrival on campus.¹³⁶ In the 1950s, television completely rewrote the rules of intercollegiate athletics by contributing exponentially to its growth and money-making potential. Television allowed institutions to contract for coverage of games and to offer events as advertising venues, available for a price. These contributions created enormous difficulties for the alleged parent under the *in loco parentis* doctrine. The NCAA awarded its first television contract to NBC in 1952 for football coverage of member games for \$1.1 million.¹³⁷ By the late 1990s, the NCAA was receiving more than eighty percent of its revenue from television, and the schools and conferences with largest programs were receiving a cut of that money through “revenue sharing.”¹³⁸ The most recently negotiated television network contract is an eleven-year, \$6 billion agreement for NCAA championship coverage and marketing beginning this year.¹³⁹ The televising of sporting events also provided tremendous advertising for institutions themselves, which theoretically increased their admissions yields generally. The revenue that athletics controlled, both in terms of profits, losses, and intangibles, made athletics the tail that wagged the institutional dog.

4. *The Ceding of Power over Athletics to National and Regional Bodies.*—Ironically, the NCAA and conference control also created an environment ripe for bifurcation. As the NCAA and conferences began to create specialized legislation, the institutions began to surrender the right to affect athletics through internal policies.

This separation of governance had a significant impact upon student-athletes’ right to be heard in the bodies that affected their lives. Because traditional campus committees no longer dealt with intercollegiate athletics, students had no on-campus representation. Also, because students were not members of the NCAA, and for a substantial period of time there was no representative body within the NCAA charged with ensuring that student-athlete concerns and interests were protected, students essentially had no representation within that body. Indeed, student representation within the NCAA did not come until 1989 through a non-voting Student-athlete Advisory Committee (“SAAC”) selected by NCAA members. Moreover, it was not until the late 1990s that the NCAA required both campus and conference SAACs. After NCAA restructuring in 1996, a national SAAC was scrapped in favor of three separate divisional ones, which reduced the ability of student-athletes to band together to affect those

136. See discussion *supra* Part I.D.

137. FALLA, *supra* note 5, at 106. General Motors was a corporate sponsor.

138. See Carter, *supra* note 4, at 23-24.

139. *Id.* at 23 (citing *NCAA, CBS Reach 11-Year 6 Billion Agreement*, NCAA NEWS, Dec. 6, 1999, at 1).

student-athletes outside of their particular division.¹⁴⁰

5. *The Marginal Societal Status of Many Student-Athletes and Their Natural Supporters.*—Another fact that facilitated bifurcation was that those participants subject to the rules were the students least able to contest them. It could be argued that by focusing early concerns on preparatory schools, colleges and universities discouraged students from economically stable backgrounds from participation in sports.¹⁴¹ Racial minorities suffered a double dose of discrimination as racial discrimination also created economic disadvantages regardless of background. By the 1990s black students would make up more than sixty percent of all male Division I basketball players and twenty-two percent of all scholarship athletes at predominantly-white institutions.¹⁴² In addition, throughout the 1990s, black males, consistently made up more than twenty-five percent of all Division I male student-athletes, including those in nonrevenue producing sports.¹⁴³ These figures held true even though black males and, indeed, blacks in general, made up far less of these institutions' entire student population, athletics staff, or faculty.¹⁴⁴

Discrimination and disadvantage also affected the natural advocates for these marginal groups—their parents and leaders in their communities. Rightly or not, facing discrimination in other areas of employment and education, many blacks came to see athletics as one of the few available avenues for education and economic advancement.

These facts also explain why very few student-athletes brought lawsuits against their schools and why those who did were largely unsuccessful, particularly when the institutions began to mobilize their own legal resources to

140. *Id.* at 33-35.

141. See discussion *supra* notes 52-53 and accompanying text (discouraging preparatory school recruitment).

142. Paul Anderson, *Racism in Sports: A Question of Ethics*, MARQ. SPORTS L.J. 357, 367-68 (1996). For various articles assessing the impact of racism in college sports, see RACISM IN COLLEGE ATHLETICS (Dana Brooks & Ronald Althouse eds. 1993) and Davis, *supra* note 58.

143. Chart, *Student-Athlete Participation by Race*, NCAA NEWS, Jan. 15, 2001. Unfortunately, this latest chart does not provide separate figures for the high-yield/high expense sports of men's football and basketball. Black women's participation in women's athletics is not as disproportionate as black male representation in male athletics. *Id.* It is clear that males, not females, were the group whose athletic talents were exploited in the early search for athletic dollars. By contrast, women were denied the opportunity to compete at many institutions up until the implementation of Title IX. The reduced professional opportunities in women's sport and possibly a shorter projected lifespan for women's professional careers due to perceived family obligations may also explain why black women are not as significantly overrepresented as black men, although they do show some overrepresentation.

144. The point is an obvious one but statistics also support it. Anderson, *supra* note 142, at 367-68 (noting that only ten percent of all athletic positions were filled by African-Americans from 1991-94; that African-Americans are only 3.6% of college athletic directors; 4.9% of associate athletic directors; fourteen percent of Division I head coaches; and six percent of all students at Division I colleges).

defend such suits.¹⁴⁵ At the same time, the marginal situation of these athletes, including the discrimination they faced, may have added to the view that student-athletes were incapable of making decisions for themselves and therefore must be paternalistically treated or that they were somehow undeserving of or could not handle the freedoms assured to non-athlete students.¹⁴⁶

D. The Results of Institutional Bifurcation

The result of bifurcation was, ultimately, an inability of colleges and universities to control their intercollegiate athletic programs and an inability to adhere to the much-heralded principles of amateurism. Intercollegiate sports essentially became a lucrative and expensive professional training arm for educational institutions. This lack of control manifested itself in numerous ways.

1. *Proliferation of Practices and Postseason Games.*—Among these manifestations were a proliferation of post-season games and a lengthening of practice times. By the 1940s, many of the modern “bowl” games that now pepper school “vacation” times and holidays were well established. These games occurred during student vacations or holiday times.¹⁴⁷ To study the proliferation of bowl games, the NCAA created a “Bowl Games Committee” in 1947.¹⁴⁸ Bowl games threatened the pure amateur model because they increased the amount of time spent on sport, emphasized commercialism, and often took place at venues and under conditions outside of the institution’s control. The overwhelming number of the bowls were sponsored by noncollegiate institutions, usually business groups or chambers of commerce that desired to attract business.¹⁴⁹

145. The NCAA set up a satellite office in Washington, D.C., in 1996 in order to be in close contact with those who could affect athletics policy. See Carter, *supra* note 4, at 24-25.

146. See Davis, *supra* note 58.

147. See NCAA, 1947 NCAA YEARBOOK 183 [hereinafter 1947 YEARBOOK]; NCAA, 1948 NCAA YEARBOOK 167; see also, e.g., *id.* at 100-01 (noting alarm at large number of Bowls being founded and expressing happiness that NCAA has determined to regulate postseason football). That committee’s 1949 report identified some fifty bowls that had taken place in recent years. See also *id.* at 167-74. The list included bowls well known to modern day football fans, such as the Cotton Bowl, East-West (Shrine) Bowl, Rose Bowl, Sugar Bowl, and Sun Bowl. Likewise, it included names not as recognizable today, including the Junior Rose Bowl, Glass Bowl, Raisin Bowl, and Burley Bowl. *Id.* at 168. While only seventeen of these responded to a questionnaire mailed by the committee to their sponsor’s anticipated address, the committee gleaned some basic knowledge of the structure of bowls or lack thereof from that information. See *id.* at 168-69. All of the bowls were postseason events.

Such reports on bowl games continued to be offered. See, e.g., NCAA, 1955-56 NCAA YEARBOOK 259 (noting ten postseason “bowl” events “for the 1955 season were certified by NCAA Extra Events Committee”: Corn (Nov. 24, 1955), Cotton (Jan. 2, 1956), Gator (Dec. 31, 1955), Orange (Jan. 2, 1956), Prairie View (Jan. 2, 1956), Refrigerator (Dec. 4, 1955), Rose (Jan. 2, 1956), Sugar (Jan. 2, 1956), Sun (Jan. 2, 1956), and Tangerine (Jan. 2, 1956)).

148. 1947 YEARBOOK, *supra* note 147.

149. Though not controlled by collegiate institutions directly, many of these bowls reported

However, institutions received compensation for their teams' participation in these events, often in the form of a substantial portion of the gate receipts.¹⁵⁰ A few bowls, among them the Rose Bowl and Cotton Bowl, were sponsored by the competing institutions themselves or their conferences.¹⁵¹ Traveling distances to games also increased as intercollegiate athletics expanded from a regional to the national scope. Even before the arrival of the airplane, under institutional control, students traveled hundreds of miles and missed days or weeks of classes.¹⁵²

The bifurcation of institutions into athletic and nonathletic venues lessened their power to control these inroads into student-athlete time. Of course, as the financial incentives of such events increased, the willingness of institutions to control bowl game proliferation was also tested, particularly when other institutions seemed to be taking advantage of such games.

2. *The Distancing of the Intercollegiate Athletics Coach.*—Another result of bifurcation was the growing separation between the intercollegiate athletics coach and his or her school. It would not be until 1955 that the NCAA secured a national regulation to require inter alia that coaches be given the same career advancement rights and security as others hired to the faculty. However, it would be longer before a majority of schools actually took action to make this happen.¹⁵³

Successful coaches thus became easy targets for those who would offer compensation and incentives from sources outside the institution's regular budgetary structure. During the 1980s, the avenues for outside supplementation of coaches' salary took a dramatic turn. The Nike Corporation altered the face of coaches compensation by initiating lucrative contracts that compensated coaches for requiring their student-athletes to wear the manufacturer's apparel

distributing a substantial portion of their receipts to participating institutions.

150. 1948 NCAA YEARBOOK, *supra* note 147, at 169. Today football bowl games remain lucrative.

151. The "Glass Bowl" was also in this group of institutionally-sponsored post-season games. *Id.* at 170. The committee concluded that the NCAA should take some action "to control its member institutions in the acceptance of bowl game bids" given the bowls' post-season character. *Id.* at 171.

152. In 1928, the NCAA's Eighth District, comprised largely of western schools, defended their contests against eastern and midwestern schools, complaining that when teams from the northwest and southwest travel 1400 to 1700 miles in competition, there is no contact. While noting the increase in such contests, the reporter stated that it was inevitable that the airplane would soon be used to transport teams, thus resolving the problem of missed classes. *See* 1928 NCAA PROCEEDINGS, *supra* note 69, at 45-46.

153. *See* 1955-56 NCAA YEARBOOK, *supra* note 147, at 36. There it was detailed that [a]n institution should enter into a contractual agreement with a coach similar to those entered into with other members of the faculty and such a contract should include the assignment of faculty rank, benefits of tenure and retirement and such other rights and privileges as are enjoyed by other members of the contracting institution's faculty.

Id.

or for otherwise promoting the manufacturer's products.¹⁵⁴ Today such contracts are a common element of coaches' compensation packages.

3. *The Failure of a Scholarly and Research-Oriented Approach to the Resolution of Issues Relating to Athletics and Education.*—Those looking at early NCAA proceedings may be surprised to see the number of formal papers that were presented. This approach to the convention was surrendered once athletic specialists began to take over the proceedings and once television came into the horizon. Later proceedings took the form of simple discussions focusing upon new rulemaking, with very few prepared remarks. Perhaps this evolution was necessary given the evolving nature of the NCAA's business. As it moved from an organization which simply talked about policy to one that actually implemented and enforced it, participants likely had little time for pipedreams. But the tradeoff was that those who had the time and mission to write and think about the relationship between athletics policy and the larger world, did not spend their research energies on that topic. Thus, generally speaking, athletics, both inside and outside of the university, did not benefit from the broader contributions generated in the research arms of universities.¹⁵⁵

E. Outside Pressures Lead to Increasing Controls

Noting the proliferation of post-season events and what they perceived as abuses in intercollegiate athletics, commentators outside of the NCAA chastened schools to take "control" of their athletic programs. The press had constantly criticized institutional administration of intercollegiate sports, even as they helped to perpetuate many of the problems of which they complained.¹⁵⁶ Among academic types, the "faculty control," and later "presidential control" banners began to wave furiously, advocating greater control over athletics. In 1929, the Savage report by the Carnegie Foundation for the Advancement of Teaching argued that "[t]he defense of the intellectual integrity of the college and of the university lies with the president and faculty."¹⁵⁷ In the 1950s, the American

154. Sonny Vaccaro, a former Nike employee and sports agent, initiated the practice of entering into these types of contracts with coaches. The contracts that originally began as "gentlemen's agreements" eventually became common in the industry as a part of a coach's compensation package. See, e.g., Bill Brubaker, *The Most Influential Man in the World of High School Basketball*, WASH. POST, Feb. 8, 1988, at C5 (noting Vaccaro's "open line" to high school and college coaches); Bill Brubaker, *Sonny Vaccaro Peddling Shoe, Influence in Basketball Circles*, L.A. TIMES, Feb. 14, 1988, at 2; Mike Stanton, *No Business, Like Shoe Biz*, NEWSDAY, Mar. 7, 1989, at 99.

155. W. Burlette Carter, *Introduction: What Makes a "Field" a Field?*, 1 VA. J. SPORTS & LAW 235, 236 (2000).

156. See *supra* note 86 and accompanying text.

157. SAVAGE, *supra* note 5, at xxi. The report went on:

With [the president and faculty] also lies the authority. The educational governance of the university has always been in their hands. . . . The president and faculty have in their power the decision touching matters affecting the educational policy and

Council on Education issued the first of many reports that called for control over athletics programs.¹⁵⁸ In addition, in the 1990s, the Knight Commission on Intercollegiate Athletics took the lead and urged the NCAA to exercise control.¹⁵⁹

Eventually, the NCAA heard and responded to calls for increased control. In 1952, the central NCAA finally entered the business of enforcing rules against members, creating the first infractions committee.¹⁶⁰ The NCAA attempted to quell the rising tide of post-season games.¹⁶¹ The NCAA also passed legislation to prevent students from participating in non-collegiate sponsored events without prior permission.¹⁶² Further, the NCAA passed legislation requiring a coach to include any supplementary income in his/her contracts and requiring the institution to enforce these contracts.¹⁶³ The NCAA also passed academic integrity legislation setting minimum academic standards for student-athletes.¹⁶⁴

Even as the NCAA became more and more involved with the perpetuation and enforcement of national standards, athletics became more lucrative and expensive for the participants. The stakes of winning grew higher for institutions. The growth in the complexity of athletics is obvious from the growth of NCAA documentation. The first volume of NCAA proceedings totaled thirty-seven pages, including the convention reports, constitution and bylaws.¹⁶⁵ By 1996, when the NCAA underwent a dramatic restructuring, the

intellectual interests of their institution. If commercialized athletics do not affect the educational quality of an institution nothing does. The responsibility to bring athletics into a sincere relation to the intellectual life of the college rests squarely on the shoulders of the president and faculty.

Id. at xx-xxi.

158. See Carter, *supra* note 4, at 41-44.

159. See *id.* at 45-48.

160. A constitutional compliance committee, was the first such attempt, but punitive action for violations required a supporting vote of the membership. That committee was later disbanded. The NCAA reentered legislation enforcement in 1952 with an infractions committee, apparently a subcommittee of the membership committee. See NCAA, 1953 NCAA YEARBOOK 243; see also NCAA, 1955-56 NCAA YEARBOOK, *supra* note 147, at 159 (reporting history of NCAA enforcement and 1952 creation of infractions committee). In 1956-1957 the NCAA Council established public, written committee procedures for the infractions committee. NCAA, 1956-57 NCAA YEARBOOK, Appendix (Recommended Policies and Practices for Intercollegiate Athletics) 39 (setting forth "official" procedures).

161. A "Principle Governing Post-season Games" first appears in the constitution adopted at the 1954 proceedings.

162. The "Principle Governing Competition in Post-season [sic] and Non-Collegiate Sponsored Contests" first appeared in the 1951 constitution. It required that such competition conform to NCAA rules. NCAA, 1950 NCAA YEARBOOK 254.

163. See NCAA, 1955-56 NCAA YEARBOOK, *supra* note 147, at 36 (providing that "special concessions to a coach . . . should be set forth in detail in the contract and accepted as legal and binding in the same manner as the other provisions of the contractual agreement").

164. The most well known of these efforts was proposition 48 and proposition 16.

165. See 1906 IAAUS PROCEEDINGS, *supra* note 63.

proceedings and the manual (separately bound) were nearly 600 pages each.¹⁶⁶

This movement toward greater central control between the 1950s and the 1990s was not without its hitches. In the 1970s, some institutions, believing that the NCAA had gone too far in investigating infractions on their campuses, sought the assistance of Congress.¹⁶⁷ Others filed lawsuits against the NCAA.¹⁶⁸

During this period as well, competitive parity became a central focus of NCAA enforcement and legislative efforts. The result was not always fair for the student-athlete for the association's focus shifted from concern on educational matters to ensuring competitive athletic equity among NCAA institutional members. Parity principles required that an offending institution be punished in such a way as to restore competitive equity to others who did not have the same advantage, even if that punishment meant that an innocent group of student-athletes might suffer. For example, if an institution were found to be in violation of NCAA regulations, those athletes involved in the violation, or the entire team, whether or not those athletes were at fault, could be declared ineligible.¹⁶⁹ At the same time, the NCAA transfer rules prohibited those same innocent athletes from transferring to other non-offending schools and playing immediately there.¹⁷⁰ Parity principles and commercial concerns ensured that institutions would not act to better the lives of their charges if so acting would affect the delicate balance among the institutions or the commercial investment in the athlete.¹⁷¹ And

166. NAT'L COLLEGIATE ATHLETIC ASS'N, 1996 CONVENTION PROCEEDINGS; 1996-97 NCAA MANUAL, *supra* note 128.

167. NCAA Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations for the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2nd Sess. (1978).

168. *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85 (1984) (rejecting the NCAA's attempt to regulate televising of member football games in the name of competitive parity); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) (challenging attempts to regulate coaching salaries in the name of parity).

169. 1989-90 NCAA MANUAL 267-71 [hereinafter 1989-90 NCAA MANUAL] (setting forth penalties for secondary and major infractions). A secondary infraction was defined as one that provided only a limited recruiting or competitive advantage and that was isolated or inadvertent in nature. *Id.* at 265-66.

170. *Id.* at 119. Transfer rules date back to the first NCAA rules adopted in 1906. *See supra* notes 106-08 and accompanying text (rule requiring one-year residence before transfers could participate).

171. Although concerns of competitive parity were always present, the parity principle was formally stated in the 1989-90 manual through the "Principle of Competitive Equity" as follows: "The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics." 1989-90 NCAA MANUAL, *supra* note 169, at 4. *Compare* NCAA 2001-02 DIVISION I NCAA MANUAL 5 (same language). In his 1995 State of the Association Address, NCAA CEO Cedric Dempsey acknowledged that the focus upon the parity principle had led some to believe that competition mattered more than the rights and needs of student athletes. Cedric Dempsey, *State*

although courts pulled back on their embrace of *in loco parentis* where the ordinary student body was concerned, they seemed to give the institutions free reign to manage athletics when student-athletes were at issue.

Declaring that participation in athletics was a *privilege*, not a right, courts found that the denial of participation by a public institution did not amount to a violation of any constitutional right.¹⁷² This characterization was particularly ironic because outside of student athletics, by the late 1960s, the right/privilege distinction in constitutional law was reportedly meeting its demise.¹⁷³ In more recent years, at least one court has suggested that athletics "eligibility" rules are subject to *greater* deference than other types of NCAA rules such as those affecting institutional rights.¹⁷⁴ The basis for such a conclusion seems to be rooted in the idea that the perpetuation of amateur athletics has some sacred status or an archaic view of student rights.

It is true that as controls over student-athletes increased, many of them gained the right to receive substantial athletic scholarships. However, not all student-athletes subject to controls received scholarships or full scholarships. As I discuss below, the legal validity of a "rights for scholarship" tradeoff is questionable when publicly-funded institutions are involved.¹⁷⁵ Moreover, the tradeoff was arguably an inappropriate proposal for institutions purportedly concerned about education and wielding such tremendous power.

In the end, however one views the situation, movements that transformed student rights in other parts of educational institutions did not cut so deeply into athletic programs. I contend that this period of institutional bifurcation and athletics isolation saw in intercollegiate athletics administration a reinforcement of the control leg of *in loco parentis* and a corresponding weakening of the welfare leg.

As might be expected with such a diverse group, over time the allegiance began to splinter, requiring different legislation for different groups.¹⁷⁶

of the Association Address, 1995 NCAA PROCEEDINGS 74-75.

172. See Carter, *supra* note 4, at 72 (citing *Graham v. Tenn. Secondary Sch. Athletic Ass'n*, 1995 U.S. Dist. Lexis 3211 (E.D. Tenn. 1995) and *Karmanos v. Baker*, 617 F. Supp. 809, 815 (E.D. Mich. 1985); see also *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (rejecting a Fourth Amendment challenge to drug testing for public school athletes, holding that participants in athletics have should expect reasonable intrusions upon their rights and privileges and that manner of testing was not unreasonable). However, the court also noted that the testing followed findings that student-athletes were leaders in the local drug culture and institutional concern that drug abuse could lead to athletics injuries.

173. See, e.g., William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (arguing that demise taking place in the 1960s).

174. See, e.g., *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998) (opining that "eligibility" rules are not commercial and thus are not subject to antitrust challenge), *cert. granted*, 524 U.S. 982 (1998), *vacated on other grounds*, 525 U.S. 459 (1999). For a questioning of this blanket view case, see Carter, *supra* note 4, at 75-77.

175. See discussion *infra* Part III.B.

176. See Carter, *supra* note 4, at 27-38 (discussing restructuring). As early as the 1950s, the

Ultimately, the NCAA divided into three different “divisions” representing clear political and financial differences in their approach to athletics. Division I schools comprised institutions with the largest athletic programs and the most to gain from television revenues. They embraced the concept of both athletic scholarships and wide media coverage and imposed the greatest restrictions on student-athletes.¹⁷⁷ Division II schools were smaller schools that offered athletic scholarships, but placed less emphasis on athletics.¹⁷⁸ Division III schools were those that rejected the notion that athletics should be uniquely considered in awarding a scholarship.¹⁷⁹ Then, in 1996 and 1997, the NCAA passed dramatic restructuring legislation. As a result, the three NCAA divisions, I, II, and III, each went their own ways legislatively and a single NCAA Manual became three manuals.¹⁸⁰ Division I schools began to handle most of their legislative business outside of the convention context; thus, the size of the proceedings decreased because there was less that was publicly available to report, but certainly the amount of business done dramatically increased.¹⁸¹ Each of these divisions would continue to assert adherence to the principle of amateurism, but each defined amateurism in its own way. Thus, as the NCAA entered the year 2000, it reversed its trend toward strong central governance.

While the form of governance has changed dramatically, the absolute control exercised by the Divisions, particularly Division I, over student-athletes’ lives has not.

This writer sees three troubling trends that characterize NCAA legislation under the perversion of *in loco parentis*. First, the central regulatory structure rarely considered the student anything but athlete *first*. Any other rights the student had outside of the athletic context were subrogated or merged into athlete rights. Second, as the central regulatory structure grew more complex, the rules were commonly interpreted to assume that action not permitted under NCAA rules was forbidden until an exception was granted. Lastly, even after the clear death of traditional *in loco parentis*, student-athletes’ interests were recognized only to the extent that they converged with institutional rights. In the case of a conflict, the student-athlete always lost. The next section examines these trends.

smaller colleges held separate “roundtable” meetings at the annual convention. *See, e.g.*, NCAA, 1949 YEARBOOK at 101-65. A separate NCAA small college committee also reflected the interests of this group. *Id.* at 230.

177. NCAA, 2000-01 DIVISION I MANUAL, at 321-38 [hereinafter 2000-01 DIVISION I MANUAL].

178. *See* NCAA, 2000-01 DIVISION II NCAA MANUAL, at 267-79.

179. *See, e.g.*, NCAA, 2001-02 DIVISION III NCAA MANUAL, at 227-37 [hereinafter 2000-01 DIVISION III MANUAL] (setting forth divisional membership requirements) and 107-08 (requiring that student-athletes meet the same institutional regulations applicable to the general student body in order to receive financial aid).

180. *See* Carter, *supra* note 4, at 35-36.

181. *Id.* at 64.

III. CONTROL, WELFARE, AND DEFERENCE TODAY

I have argued so far that to understand the degree of control exercised over student-athletes in intercollegiate athletics, one must appreciate the role of the *in loco parentis* doctrine. I have attempted to illustrate that the doctrine provided the legal and social basis for institutions to exercise broad controls over the lives of student-athletes in the name of protecting their welfare. I have further attempted to show that although the doctrine met its demise in the 1960s and 1970s, it remained a force in intercollegiate athletics administration. A distorted version of that doctrine emerged, one that emphasized control and deemphasized welfare. Below are two examples of how this altered *in loco parentis* doctrine continues to be manifested in contemporary intercollegiate athletics policy.

A. Student Free Speech Rights

In 1996, *Sports Illustrated* invited a student-athlete to write for the magazine after the magazine discovered the student's work on his own website. The student-athlete's school denied him permission to write the article on the grounds that it would violate the NCAA's amateurism principle. The school reasoned that the student-athlete's writing would be used (either directly or indirectly) to promote the magazine and, therefore, *Sports Illustrated* would be exploiting his athletic ability.¹⁸²

The relevant NCAA rule was Bylaw 12.5.2.1, which prohibited a student-athlete from using his or her name or picture to directly advertise or promote the sale or use of commercial products or services.¹⁸³ NCAA regulations *did* permit uncompensated and nonpromotional *radio and TV* appearances (with restrictions), but the rules said nothing about *writing*.¹⁸⁴ The interpreters concluded that because the activity was not permitted, it was prohibited. The student did not write the column or challenge either the NCAA or his school in court.¹⁸⁵

Concerned about the irony of educational institutions preventing students from taking advantage of such experiences, some institutions led an effort to amend the rules to expand student writing opportunities.¹⁸⁶ However, as a result of a vote to restructure the NCAA at the 1996 and 1997 conventions, each of the three NCAA divisions had the right to develop its own rules regarding student writing opportunities. The differences in the legislative approaches that emerged among the divisions illustrate how institutional financial considerations create conflicts of interest that make it difficult for institutions to give student-athletes

182. See Greg Belinfanti, *Athletes Need a Way to Get the Word Out*, NCAA NEWS, Mar. 25, 1996, at 4. Students were permitted to publish in the *NCAA News*, the official NCAA newspaper. Thus, Belinfanti, a different student, wrote an opinion piece challenging the outcome.

183. 1996-97 NCAA MANUAL, *supra* note 128, at 105-06.

184. See *id.* at 106.

185. See Belinfanti, *supra* note 182.

186. The original proposals for amendments came up at the 1997 convention. See NCAA, 1997 NCAA CONVENTION PROCEEDINGS A125-A127 [hereinafter 1997 NCAA PROCEEDINGS].

their full due. In other words, the *Sports Illustrated* case and the legislation that flowed from it demonstrate the perversion of *in loco parentis* that now guides intercollegiate athletics regulatory policy.

Significantly, the *Sports Illustrated* matter raised the rights of all student-athletes to communicate in various media, not just the rights of one. As noted above, the then-existing rule allowed uncompensated and unpromotional radio and television appearances only.¹⁸⁷ It said nothing about writing opportunities. Perhaps the reason for the silence was because the drafters didn't think of the possibility that student-athletes would wish to write in this manner. It seems that regulators were only thinking of the student-athlete as an *athlete* playing for a team, and the key media for athletes in that role were sports radio and television. Such broad legislation also probably resulted from the assumption that the NCAA and institutions had the *power* to broadly circumscribe student conduct in the name of athletics, as institutions had so for so long under the *in loco parentis* doctrine.

How then did each division resolve the *Sports Illustrated* dilemma? In short, those divisions with larger financial investments in athletics granted fewer rights; those with a smaller investment granted greater rights. Thus, Division III, which tends to have significantly smaller athletic programs, does not depend on athletics for income and does not offer athletically based scholarships, imposed no restrictions on its student-athletes writing, either during season or out of season. It declared that Division III students may participate at any time in all media activities, including those for compensation.¹⁸⁸

187. See 1996-97 NCAA MANUAL, *supra* note 128, at 105-06 (generally prohibiting students from receiving pay for athletic ability and from engaging in promotion). Section 12.5.3 stated:

Radio and Television Appearances. If a student-athlete's appearance on radio or television is related in any way to athletics ability or prestige, the student-athlete shall not receive any remuneration for that appearance; nor shall the student-athlete make any endorsement, expressed or implied, of any commercial product or service. The student-athlete may, however, receive legitimate and normal expenses directly related to such an appearance, provided it occurs within a 30-mile radius of the institution's main campus. The institution may provide such expenses for such an appearance in the general locale of an institution's away-from-home competition. . . .

188. NCAA, 1997-98 NCAA DIVISION III MANUAL 67 (1998).

12.5.3 Media Activities—Division III. A student-athlete may participate in media activities (e.g., appearance on radio, television, in films or stage productions, or participate in writing projects) when the student-athlete's appearance or participation is related in any way to athletics ability or prestige. A student-athlete may receive legitimate and normal expenses directly related to such an appearance or participation. The student-athlete may engage in such activities at any time and may receive compensation at a rate commensurate with the going rate in that locale for similar services. Further, the student-athlete's name may be used to advertise his or her participation in such activity, provided the student-athlete's status as a student-athlete is not used for promotional purposes.

By contrast, Divisions I and II followed a single approach. They divided student rights into two categories: (1) those "During the Playing Season" and (2) those "Outside the Playing Season."¹⁸⁹ First, during the season, a student-athlete can appear on radio or television programs or engage in writing projects at any time, so long as the student's participation was uncompensated and the student is not "promoting a commercial product or service."¹⁹⁰ The language adopted expressly permits coaches to have students appear on their television shows,¹⁹¹ an express assurance not previously in the rules. Of course, while this new rule allowed "writing" during the season, it said nothing about appearances in film and stage productions during the season, even those held on campus.¹⁹² Given the focus on the various types of media appearances in the rules, and the mention of film and stage in the off-season provision, this omission was no accident.¹⁹³

These two divisions took a slightly different view as to student expression when the playing season was over. After the season, student-athletes may appear on radio and television shows, and may also appear in film and stage productions on an uncompensated and nonpromotional basis. As a caveat, however, the student must be in good academic standing in order to take advantage of these new "privileges."¹⁹⁴

189. 1997 NCAA PROCEEDINGS, *supra* note 186, at A-125 to A-126.

190. *Id.*

191. *Id.* at A-125.

192. *Id.* at A-125 to A-126.

193. See NCAA, 1997-98 NCAA DIVISION I MANUAL 81 (1998).

(a) During the Playing Season. *During the playing season*, a student-athlete may appear on local radio and television programs (e.g., *coaches shows*) or engage in writing projects when the student-athlete's appearance or participation is related in any way to athletics ability or prestige, provided the student-athlete does not receive any remuneration for the appearance or participation in the activity. The student-athlete shall not make any endorsement, express or implied, of any commercial product or service.

Id. (emphasis added). The provision also permitted the student-athlete to "receive legitimate and normal expenses directly related to the appearance." *Id.* Thus, this provision aided schools because it permitted schools or coaches to finance such appearances when they were made on the school's behalf or on the coaches' shows, without violating financial aid rules. See generally *infra* Part III.B (discussion of financial aid rules).

194.

(b) Outside the Playing Season. Outside the playing season, a student-athlete may participate in media activities (e.g., appearance on radio, television, in films or stage productions or participation in writing projects) when such appearance or participation is related in any way to athletics ability or prestige, provided the student-athlete is *eligible academically to represent the institution* and does not receive any remuneration for such appearance or participation. *The student-athlete may not make any endorsement, expressed or implied, of any commercial product or service.*

1997-98 NCAA DIVISION I MANUAL, *supra* note 193, at 81 (emphasis added). Note that the second provision mentions stage productions while the first does not.

Members of the Student-Athlete Advisory Committee ("SAAC") and their institutional supporters urged support of these changes, arguing that student-athletes need some relief from existing restrictions in order to have a broad educational experience and that student-athletes should be treated as other students on these matters.¹⁹⁵ But indeed, these provisions do not treat student-athletes like other students.

Indeed, although many publicly-supported institutions belong to the NCAA, not once in the discussions at the convention did anyone mention the First Amendment or "free speech." No one seemed to realize, or seemed willing to say—not even the student representatives—that "rights" might actually be at issue, rather than mere privileges.¹⁹⁶ No one surmised that academically *ineligible* students may be the ones most interested in speaking about athletic issues, yet, in Divisions I and II, they are barred from doing so without express permission in the offseason. Perhaps substantial discussions took place at the NCAA Council, which in fact sponsored the legislation, but the outcome does not suggest it.¹⁹⁷ With respect to all three pieces of legislation, the NCAA's 1997 convention notes stated that the proposals were "designed specifically as a student-athlete welfare issue" and were "a step toward enhancing the student-athlete's overall experience, thereby encouraging more student-athletes to take full advantage of the *educational opportunities related to participation in intercollegiate competition*."¹⁹⁸ Certainly, broader rights than those related to participation in intercollegiate athletics were at issue.

The now defunct *in loco parentis* doctrine certainly offers support to the approaches of Divisions I and II. One argument is that the legislation uses media and other appearances as "carrots" to ensure that students keep up their grades. Another is that the rules during the playing season represent an assessment by the institution that students simply cannot judge for themselves how much time plays and productions will take. Finally, it can be argued that the legislation protects

195. NCAA, 1997 NCAA CONVENTION PROCEEDINGS, *supra* note 186, at A-126 to A-127. The statement added that "in the spirit of federation, each division has proposed standards regarding a student-athlete's participation in media-related activities that it believes is appropriate for that division." *Id.* at A-127.

196. Later, the SAAC members called the legislation "the most far-reaching change made at [the 1997] Convention" and stated that "[u]nder the new regulation, student-athletes are free to express themselves both as students and as athletes, without endangering their eligibility." Karrie Farrell et al., *Student-Athlete View—Convention Listended [sic] to Concerns of Athletes*, NCAA NEWS, Jan. 27, 1997, <http://www.ncaa.org/news/1997/970127/comment.html>. The 1995-96 annual report for that committee notes that "the NCAA Communications Committee requested input from the SAAC regarding student-athletes' right to write for commercial publications," and that after discussing the issue, "the SAAC agreed that student-athletes should be permitted to write for commercial publications" and "agreed to support a legislative proposal that will give student-athletes this opportunity." *Student-Athlete Advisory Committee, in 1995-96 NCAA ANNUAL REPORT* 146, 146.

197. NCAA, 1997 NCAA CONVENTION PROCEEDINGS, *supra* note 186, at A-126 to A-127.

198. *Id.* (emphasis supplied).

amateurism, an institutional interest, by ensuring that students don't use their "athletic ability" for notoriety (thus, it would be argued, achieving "pay"). It could also be argued, of course, and seems clear to this writer, that the primary reason that the Division I and II legislation did not go further (but did protect coaches) is that the financial interests of the institutions drove the legislation and not student-athlete welfare. At the very least, the debate and the outcome demonstrates that the present NCAA regulatory scheme poorly protects student interests.

As discussed above, publicly-funded institutions are obligated to respect student speech rights, and there is no exception for student-athlete speech.¹⁹⁹ As also noted earlier, private institutions have adopted statements of rights and responsibilities that provide for similar student speech protections.²⁰⁰ Thus, it seems that the NCAA's members cannot simply assume that it may limit the speech *a la in loco parentis*; they should have grappled with the question of rights, not merely with question of privileges. That the convention discussions did not raise the issue indicates again how the bifurcated nature of modern institutions with significant athletic programs negatively impacts student-athlete interests.²⁰¹

But let us consider the legal questions further. Can publicly funded institutions escape criticism by classifying student-athlete speech as "commercial speech?" Indeed, the courts have shown some willingness to tolerate greater restrictions on commercial speech,²⁰² but this tolerance does not save the NCAA's approaches.²⁰³ Traditionally, commercial speech is speech that proposes a transaction.²⁰⁴ The Division I and II legislation at issue here clearly reaches far beyond commercial speech to include noncommercial speech. But

199. See *supra* notes 196-98 and accompanying text.

200. See *supra* notes 186-95 and accompanying text.

201. See *supra* notes 189-94 and accompanying text.

202. See, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (acknowledging limitations on protections of commercial speech but rejecting state ban on promotional speech by public utility as not sufficiently linked to compelling state interest). Speech may be commercial even if the proposition includes speech about noncommercial issues. *Bd. of Trs. v. Fox*, 492 U.S. 469, 474-75 (1989) (remanding for consideration of whether banned presentations of commercial products within student dorm room constituted commercial speech; case later dismissed as moot).

203. Division I and II legislation is *not* on its face limited only to speech that proposes a commercial transaction. This fact that Division I and II legislation was intentionally broad is made even clearer by comparing it to that adopted by Division III during the same time period and within the same legislative package.

204. See *Cent. Hudson*, 447 U.S. at 562. In *Central Hudson* the court used a four-part analysis to determine whether a regulation of commercial speech would survive First Amendment scrutiny. *Id.* at 566. First, protected speech must at least involve "lawful activity and not be misleading." *Id.* Second, the "asserted governmental interest" must be "substantial." *Id.* If both of these conditions are met, then the courts must consider "whether the regulation directly advances the governmental interest asserted" and "whether it is narrowly tailored to serve that interest." *Id.*

even if one construes the legislation regulation more narrowly, as affecting only speech about sports to sports media (and that interpretation is not consistent with the partial prohibition on films and plays), the regulation still falls flat when measured against First Amendment doctrine. Commercial speech regulation traditionally is concerned with ensuring *accuracy* so that the public may make informed choices based upon truthful information.²⁰⁵ If the restrictions reach beyond this concern, the Supreme Court has said that “there is far less reason to depart from the rigorous review that the First Amendment generally demands.”²⁰⁶ None of the restrictions on expression discussed above appear to vindicate an accuracy concern. Finally, regulations of commercial speech must be narrowly tailored to satisfy a substantial governmental interest.²⁰⁷ As the *Sports Illustrated* matter demonstrates, the NCAA’s restrictions were, and they are, far-reaching. Is the promulgation of amateur sports so substantial a governmental interest that such broad restrictions on speech and other fundamental rights would be considered justified? Such an outcome would herald a sad day indeed.²⁰⁸ And

205. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996). “It is the State’s interest in protecting consumers from ‘commercial harms’ that provides ‘the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.’” *Id.* at 502 (plurality opinion) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)). “Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms.” *Id.* at 502-03. Thus, the Court stated that bans that are broader than this traditional interest “not only hinder consumer choice, but also impede debate over central issues of public policy . . . [and] usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth.” *Id.* at 503 (quoting *Linmark Assocs. Inc. v. Willingbow Township*, 431 U.S. 85, 96 (1977)).

206. *Id.* at 501. Two recent Supreme Court cases reflect a possible expansion in the Courts’ view of commercial speech rights. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), a unanimous Court struck down a federal law prohibiting the disclosure of the alcohol content of beer on labels or in advertising. *Id.* at 478. The federal government claimed an interest in both facilitating state efforts to regulate alcohol and preventing “strength wars” among beer brewers, which would result in consumers buying beer based upon alcohol content. *Id.* at 483-85. The Court did not find the former interest sufficiently substantial and concluded that the overall legislation did not “directly and materially advance” the other asserted interest because of inconsistencies in its regulatory scheme. *Id.* at 486-88. In another case, the Court struck down a state statute prohibiting the advertising of retail prices for alcohol. *44 Liquormart*, 517 U.S. at 589. Justice Stevens, writing for a plurality, distinguished restrictions that are designed to ensure accuracy from restrictions that “entirely prohibit[] the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process.” *Id.* at 501. In both cases, the Court emphasized that the statutes went beyond the historical concern of ensuring the accuracy of commercial speech so that the public can make informed decisions based upon reliable information. See *id.* at 504; *Rubin*, 514 U.S. at 483.

207. See *Cent. Hudson*, 447 U.S. at 566.

208. The passage of statutes prohibiting sports agents from providing benefits to student-athletes and limiting their contact with them suggests at least an *asserted* governmental interest in protecting amateurism. On the other hand, arguably, these statutes are aimed at protecting the

once again, it may be argued that given their breadth, these restrictions are designed to protect commercialism, not amateurism.

What of an argument that students have contracted away these rights in exchange for the right to play intercollegiate athletics at their institution? Such an argument must also fail. Although courts have held that playing athletics is a privilege, not a right,²⁰⁹ in other contexts they have rejected claims that a waiver of constitutional rights—particularly First Amendment rights—is an appropriate condition for states to impose upon the granting of such “privileges.”

Significantly, in this debate, as in so many others about intercollegiate athletics regulations, students received only that which was consistent with the financial interests of the NCAA as a whole or the particular educational institution affected. Sadly, the presumption of a right to restrict student-athlete speech and associational rights cuts across the entire legislative scheme of NCAA amateurism rules. Consider, for example, the NCAA limitations on students’ participation in events and on teams not sponsored by member institutions. These restrictions are riddled with so many exceptions that one cannot reasonably explain them as a function of educational decisions about what is best for students or even best for intercollegiate athletics as a whole. Instead, many of them appear to result from political compromises designed to protect commercial interests. For example, basketball student-athletes in Division I are declared ineligible if they participate in organized *amateur* competitions not sponsored by their member institutions or excepted by the NCAA.²¹⁰ Division I students in sports *other than* basketball may practice with outside teams but may not compete with them.²¹¹ A few cases have considered student-athletes’ First Amendment rights, but they have all focused narrowly on whether enforced eligibility rules improperly affect the freedom to associate with other amateur or professional athletes. The answer to that much easier question has been “no.”²¹²

commercial interests of the institutions involved, many of which are state entities. *See, e.g., CAL. BUS. & PROF. CODE* 18895-18897.97 (West 1997). And as noted earlier, in the antitrust context, some judges have indicated that the protection of amateur sports may be sufficient to grant favored treatment because some restrictions are necessary to enable the product of intercollegiate athletics to exist. *See supra* note 174 and accompanying text. On the other hand, to this author’s knowledge, none of the cases to date have pitted rights as fundamental as those protected under the First Amendment against amateurism or parity concerns. Moreover, this author believes that only when the essential purpose of the action is to promote athletics’ educational nature, should institutions be allowed to use the argument that a regulation is needed to protect amateurism. *See Carter, supra* note 4, at 90-95 (courts must distinguish varying goals of NCAA policies and give deference only when education is the central goal).

209. *See supra* note 172 and accompanying text.

210. 1997-98 NCAA DIVISION I MANUAL, *supra* note 193, at 238.

211. *Id.* at 158.

212. For example, in *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987), a Canadian student-athlete desiring to play at an American university unsuccessfully challenged a declaration of ineligibility. The NCAA issued the declaration because the athlete had played on an uncompensated basis for a professional Canadian team. *Id.* at 260. The student brought an action

Overall, the legislation emerging from what we may call this “student-athlete free speech debate” demonstrates the distance that has divided institutions into athletic fiefdoms and other fiefdoms. The legislation considered the student-athlete solely as “athlete.” It is difficult to imagine such a rule being promulgated in some other department of the institution without serious questions of the First Amendment and/or academic freedom and general student speech rights being raised.

B. Financial Aid and the Right to Work

NCAA regulation of student-athlete employment and financial aid issues also provide clear examples demonstrating the presumption of absolute control over student-athletes and the financial interests that often lead regulators to ignore student-athlete rights. The conflict is particularly prevalent in Division I, and thus its approaches will be the focus of this section.

In earlier times, the question of whether institutions should provide financial aid to student-athletes on the basis of their athletic ability was hotly-debated. In 1948, opponents of athletically-based financial aid were successful in altering the NCAA’s constitution to expressly prohibit any such aid. Article III of the constitution set forth five “principles”: (a) “Amateurism”; (b) “Institutional Control and Responsibility”; (c) “Sound Academic Standards”; (d) “Financial Aid to Athletes”; and (e) “Recruiting.”²¹³ These principles later became known as the “Sanity Code.”²¹⁴ The first three principles found their roots in the old constitution,²¹⁵ and the last two were new public statements.

The “Principles Governing Financial Aid to Athletes” flatly banned all athletically-related financial aid, but provided that a member institution could award aid to athletes if it based the award on non-athletic qualifications, such as

under 42 U.S.C. § 1983 (Supp. V 1999), claiming that the disqualification penalized him for exercising his First Amendment right to associate with others. *Karmanos*, 816 F.2d at 260. The court found no violation of the student’s associational rights. *Id.* The court reasoned that the rule did not prohibit him from association per se, but that if he did play for a professional team, then the NCAA could declare him ineligible. *See id.* The court’s explanation merely restates the rule; it fails to illuminate the logic for the outcome.

However, even if *Karmanos* is followed, it can be distinguished from the current debate on the grounds that (1) there was no question that the athlete in *Karmanos* played with *professional* athletes, and (2) athletes like the one in *Karmanos* would gain an unfair competitive benefit against other amateurs by competing with professionals. In contrast, the NCAA regulations discussed above apply to play for concededly amateur organizations. Moreover, the athlete in *Karmanos* actually *did* play on a professional team, and although the facts are unclear, he may have had reason to know that his amateur status might be affected. *Id.* Ironically, as this article went to press, Divisions I and II were revisiting the rules on professional play prior to college. *See infra* notes 248-50 and accompanying text.

213. 1947 NCAA YEARBOOK, *supra* note 147, at 212-13; *see also id.* at 188-92.

214. FALLA, *supra* note 5, at 132-35; *see also* NCAA, 1946 NCAA YEARBOOK 172-73.

215. *See* 1946 YEARBOOK, *supra* note 214, at 172-73.

academics or need.²¹⁶ The code further required that "[a]ny scholarship or other aid" to student-athletes had to be awarded through an institution-approved agency.²¹⁷ The "Principle Governing Recruiting" prohibited athletics staff or other officials from soliciting prospective athletes with the promise of financial aid.²¹⁸

In order to enforce these principles, the NCAA established a constitutional compliance committee to interpret the code in instances of charged non-compliance.²¹⁹ If an institution was found to have violated the code, then its membership was to be terminated.²²⁰

In the end the approach was a disaster. There are indications that the NCAA leadership may have railroaded the legislation through in response to negative press reporting alleging improper institutional financial support of athletes. Indeed, the NCAA's executive committee took the unusual step of approving the establishment of the compliance committee even before the membership had voted to adopt the rules and limit the ability of members to make amendments.²²¹ The lack of membership consensus on the aid question created difficulties later. In the following year, seven institutions—The Citadel, Boston College, University of Maryland, Villanova, Virginia Military Institute, Virginia Polytechnic Institute, and University of Virginia—were found in violation of the code, and the compliance committee moved for their expulsion from the NCAA.²²² Among other charges, the committee claimed that at least some of the institutions provided free room and board to football players.²²³ Sensing wider support among NCAA members, the accused institutions unified themselves and the membership against the compliance committee charges.²²⁴ Led by their own Presidents, these seven colleges and universities put the compliance committee and the NCAA itself on trial—and the compliance committee failed to obtain the necessary two-thirds majority for expulsion.²²⁵

216. 1947 NCAA YEARBOOK, *supra* note 147, at 213.

217. *Id.*

218. *Id.*

219. *Id.* at 198-99 (discussing adopted executive regulation establishing the committee).

220. FALLA, *supra* note 5, at 134.

221. See generally 1947 NCAA YEARBOOK, *supra* note 147, at 185-96, 198-99. NCAA President Lieb noted that unusual action was taken because the NCAA was "under very close scrutiny" and "many eyes throughout the country [were on the] convention." *Id.* at 186-87. Lieb noted that amendments at the convention would violate the NCAA rule requiring two weeks notice of any constitutional changes and urged members to leave interpretational issues to the compliance committee. *Id.* at 187. This put voters in the position of voting either in favor of, or against, the entire package. Indeed, when a member proposed an amendment to permit some athletic subsidies, Lieb suggested that the speaker was out of order in light of the earlier comments. See *id.* at 189.

222. 1949 NCAA YEARBOOK, *supra* note 176, 191-207 (noting charges against the institutions).

223. See *id.* at 191-92.

224. See *id.* at 206.

225. The vote was 111 to 93. See *id.* at 205-07.

The NCAA's official history describes the harshness of the action as the defining issue in the "Sanity Code" debate.²²⁶ However, the convention transcript suggests that just as important was the division over the question of student financial aid itself and whether or not schools should provide it. Those who desired to build athletic programs knew that if athletes were not provided athletics-based scholarships, many would be forced to take off-campus jobs, allowing them less time for athletics. These individuals viewed the attempts to limit institutional aid as an attempt to undercut athletic programs.²²⁷ On the other hand, some felt that athletic scholarships were against everything an academic institution stood for and that this concession would mean the end of amateurism and academic integrity.

Although no students or student representatives participated in any of these debates, some of the speakers did address student welfare and rights, both when the legislation was first considered and later when the termination question was brought to the floor. One speaker argued that the rule penalized student-athletes who wanted to play on teams. This speaker considered it wiser to give an athlete two meals a day, rather than require him to practice for two hours a day and then work to earn his meal.²²⁸ The Citadel, a South Carolina military institution, argued that military men, with their rigorous training schedule, could not find work with hours reasonable enough to permit them to earn their expenses.²²⁹ Others also argued that the subsidy rules were far too strict and did not allow schools who invited athletics participation and required training as a prerequisite to provide for the legitimate needs of student-athletes.²³⁰

As most readers know, in the years following these debates, scholarships based at least in part on athletic ability, became quite common in what ultimately became the Division I and Division II schools.²³¹ But once it became clear that athletic scholarships were inevitable there arose fears, particularly in Division I, that some institutions would use the promise of student aid to gain competitive advantages or would permit an institution to completely undercut remaining pay-for-play restrictions under the guise of giving a student institutional financial aid. Driven by these concerns, the NCAA restricted a full- or partial-scholarship student-athlete's ability to obtain financial aid from other sources including employment during the school term. First, beginning in the early 1950s, the NCAA started to control the *sources* of aid, requiring all financial aid, except

226. See FALLA, *supra* note 5, at 132-35.

227. For discussion of efforts to restrict aid through the adoption of the Sanity Code at the 1948 convention, see, for example, Carter, *supra* note 4, at 41 n.31 (citing NCAA, 1948 NCAA YEARBOOK 190-207). Many argued that the rules which controlled *needs*-based financial aid were far too strict and did not allow institutions room to provide for the legitimate financial needs of student-athletes. See also 1949 NCAA YEARBOOK, *supra* note 176, at 190-205.

228. 1948 NCAA YEARBOOK, *supra* note 227, at 99-100 (comments of Harvey J. Harman, President, American Football Coaches Association).

229. 1949 NCAA YEARBOOK, *supra* note 176, at 197.

230. See, e.g., *id.* at 199.

231. See *supra* notes 176-80 and accompanying text.

that provided by a parent or legal guardian, to be administered by the institution unless otherwise specifically excepted by regulation.²³² Second, it began to control the *amount* of aid. Starting in the mid-1950s, it provided that such aid could not exceed the commonly-accepted costs of education.²³³ In the years that followed, these aid limits became quite complex in Division I as the NCAA sought to preserve parity among Division I institutions by regulating the actual number of scholarships per sport that could be provided and the maximum amount of financial aid that any student-athlete could receive.²³⁴

In addition, the NCAA also limited a scholarship student-athlete's ability to get a job to meet his or her financial need. In earlier times, students in need and without other scholarships *had* to work because institutions declined to provide financial aid based on athletic ability.²³⁵ But because many of the jobs student-athletes were suited for arguably involved use of their athletic abilities (such as lifeguarding or playground camp supervisor), and because the NCAA's definition of amateurism was so broad, NCAA regulators began to issue specific regulations dealing with such jobs and the extent to which student-athletes could take them for pay.²³⁶ Eventually, the NCAA expressly included employment income in the calculation of the cap on *total* financial aid any Division I student-athlete could receive thus limiting the amount of employment a student-athlete could undertake.²³⁷ This approach, combined with the aforementioned total financial aid limits, meant that a student-athlete who had financial needs above the established cap for financial aid could not work to fill that need, and thus had

232. See NCAA, 1951 NCAA YEARBOOK 217-18, 254. See generally FALLA, *supra* note 5, at 135 (noting NCAA Council's adoption of twelve-point plan that included recommendations proposing that institutions limit amount of financial aid to student-athletes). Compare 1996-97, NCAA MANUAL, *supra* note 128, at 205-06 (requiring that all aid received by the student-athlete be administered by the institution unless from a parent or guardian or unless the aid source is specifically exempted by NCAA rule).

233. Throughout 1955 and 1956, the NCAA Council, then a body charged with issuing interim decisions between conventions, issued an interpretation of the amateurism rules stating that institutional financial aid should not exceed "commonly accepted educational expenses and that additional aid would be considered pay for play." This was apparently the beginning of NCAA's attempts to set maximum limits for student-athlete financial aid. This approach would broaden until the NCAA set maximum per athlete guidelines for particular sports as well as total scholarship number guidelines for particular sports. See 2000-01 DIVISION I NCAA MANUAL, *supra* note 177, at 178, 188-96.

234. See *id.*

235. See *supra* notes 64-68 and accompanying text (resistance to aid based upon athletic ability).

236. See 1955-56 YEARBOOK, *supra* note 147, at 5 (special exceptions under "Principle of Amateurism" allowing student-athletes to serve as playground supervisors, lifeguards, and other roles).

237. E.g., 1996-97 NCAA MANUAL, *supra* note 128, at 212 (requiring institution to consider Division I student employment in determining whether permissible aid limits reached, that is, a full grant-in-aid).

to secure student loans to cover the balance.

Perhaps one would justify at least some of these work limits on a theory that a student-athlete could not reasonably practice, play sports, and also hold down an outside job. However, to find the basis for work limits upon that theory, one would need the help of the *in loco parentis* doctrine which, again, had been abandoned as to nonathlete students. Moreover, if time commitments of needy student-athletes was the primary consideration, institutions could have cut back on athletic programs to allow more time for work or, alternatively, eliminated the need for work by meeting a student-athlete's full, true need. However, it is more likely that work limits that left a need gap found a basis in the obsession with amateurism and the battle among institutions for competitive parity. On the amateurism side, concern may have existed that institutions would actually use alleged work arrangements to funnel additional monies to student-athletes. On the parity side, there were likely concerns that a promise to arrange work for a student—or work that was really not work at all but a means of funneling additional money to the student—could be a powerful recruiting tool. Thus, institutional distrust within the NCAA led to rules that dramatically reduced student freedoms and opportunities and significantly. Moreover, the rules often affected athletes in revenue-producing as well as non-revenue-producing sports alike. The results were some rather odd permutations on student work and financial aid rights. For example, in the 1980s and early 1990s, NCAA rules allowed a Division I scholarship student-athlete to work and not count the income as financial aid, so long as the employer deposited all of the student-athlete's earnings with the institution, which then could use the money as it saw fit.²³⁸ Initially, the NCAA even restricted student-athlete access to *federal* financial aid grants by counting money received thereby against NCAA aid caps, irrespective of the student's financial need. In 1984, after much controversy, it modified that position.²³⁹

In January 1997, the NCAA restructuring vote allowed each division more freedom to make its own rules. As part of the restructuring legislation, the NCAA revisited the right to work issue. Consequently, legislation was passed

238. 1989-90 NCAA MANUAL, *supra* note 169, at 140. In 1988-89, the NCAA Council permitted this arrangement because the student-athlete never received the money, thereby emphasizing that the primary NCAA concerns were competitive parity and adherence to amateurism. See NCAA, 1988-89 NCAA MANUAL 418.

239. See NCAA, 1984 NCAA PROCEEDINGS 152-53. In 1984, members moved to amend the NCAA rules so that student-athletes would be legally entitled to Pell Grants based upon demonstrated need. See *id.* To accomplish this, Pell Grants would be removed from the aid figured into the "cap" imposed by divisions. See *id.* at 152. Members who supported the amendment argued that to deny students in need was unfair and possibly illegal, particularly when NCAA rules also prohibited students from working. *Id.* at 152-53. With a two thirds majority required, the proposal was first voted down by a vote of 374 to 226. *Id.* The supporters then moved to reconsider and after discussion it eventually passed. *Id.* These discussions demonstrate the precarious nature of student-athlete rights in a representative body where institutional financial interests are at stake.

expressly permitting Division I student-athletes to earn the *difference* between their scholarship and the cost of attendance, provided that the student remained academically eligible to compete for the institution.²⁴⁰

But there was significant opposition to the change. Opponents argued that athletic departments would have to get involved in setting up student employment and raised the difficulties of monitoring student financial receipts.²⁴¹ That opposition was so significant that in August 1997, the governing board for Division I voted to suspend the rule loosening work limits for one year.²⁴² By January 1998, a compromise agreement was reached. Essentially, the emerging Division I rule capped the amount the student-athlete could earn in legitimate off-campus employment by allowing the student-athlete to work up to the amount of the grant-in-aid—that is, books, tuition, fees, room and board (but not other expenses)—plus \$2000.²⁴³ The revised rule requires the student to file information about that employment with the athletic department.²⁴⁴ This rule was certainly an improvement from complete limitations on work. Still, it continued limitations on student work in all cases. Moreover, the \$2000 cap on earnings for students on a full-grant-in-aid limited the pool of employers.

The final bell on these contentious financial aid issues in Division I has yet to ring. Only weeks before this article went to press, Division I's Management Council voted to lift the \$2000 cap on work restrictions for its student-athletes. At press time, that decision awaits final approval by the Division I board.²⁴⁵

Significantly, none of these convention discussions of legislation limiting

240. 1997-98 NCAA DIVISION I MANUAL, *supra* note 193, at 180.; *see also id.* at 176 (full grant-in-aid consists of tuition, course-required books, fees, room and board).

241. *E.g.*, 1997 NCAA PROCEEDINGS, *supra* note 186, at 315 (commenter raising monitoring concerns, noting students can work during vacations and summers and that some student-athletes are better off financially than nonathlete students under existing financial aid rules). *See also id.* at A-128-A134 (original 1997 proposals).

242. *See, e.g.*, *Management Councils Start with New Structure*, NCAA NEWS, Aug. 18, 1997, at 10 (noting that Division I Management Council expressed support for theory of Proposition 62, but voted in favor of one-year delay before implementation); *see also Division I Board Seeks Reaction to Earnings Issue*, NCAA NEWS, July 7, 1997, at 1 (noting Big Ten Conference's request for a one-year moratorium).

243. *See* 2000-01 DIVISION I Manual, *supra* note 177 (defining Division I full grant-in-aid as "tuition and fees, room and board, and required course-related books"); *id.* at 182-83 (allowing a student to earn up to a full grant-in-aid plus \$2000 while working at legitimate off-campus employment so long as the student is academically eligible to compete for the institution, has spent a year at the institution, and files information on the employment with the athletic department of institution); *id.* at 176-78 (outlining permissible financial aid, including institutionally-arranged work rules, and declaring that the student-athlete may not participate in athletics if he or she receives financial aid that exceeds a full grant-in-aid); *id.* at 178 (noting that employment during school year except that expressly permitted, is counted as financial aid).

244. *Id.* at 182-83.

245. *See Management Councils Take Mountain-Sized Steps at Denver Session*, NCAA NEWS, Apr. 15, 2002.

student employment considered whether students facing need gaps might have an independent “right to work” under the U.S. Constitution at publicly-supported institutions. Although the issue is rarely litigated today, the Supreme Court has found a “right to work” in the Fourteenth Amendment to the U.S. Constitution, stating that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”²⁴⁶ Where the limitations are applied to a suspect class (a point not at issue here), restrictions are subject to the strictest scrutiny.²⁴⁷ But even where the class is not one traditionally treated as suspect, the states must offer some rational basis to support the restriction and demonstrate that it is narrowly tailored to serve a legitimate purpose. Work restrictions were born of distrust among Division I schools. But in depriving student-athletes of work opportunities, institutions deprived students not only of money, but of the opportunity to learn of the educational value of work experience that does not involve athletics. Students in non-revenue producing sports and those who do not seek careers as professional athletes (including many women) often need to show experience other than athletics participation on their resumes. For some athletes, “I played sports” alone is simply not enough, and for others, it simply *should* not be enough.

As this Article is being published dramatic changes are taking place as all three Divisions rethink their regulation of amateur athletics. In 2001, Division II adopted sweeping revisions to its amateurism rules allowing students to accept some pay for play prior to entering college full time.²⁴⁸ Division III has stayed

246. *Truax v. Raich*, 239 U.S. 33, 41 (1915); *see also* *Application of Griffiths*, 413 U.S. 717 (1973) (holding that Fourteenth Amendment prohibited state from requiring U.S. citizenship as a prerequisite to bar admission).

247. Historically, most of the right to work restrictions that have been challenged in the courts have been directed at aliens, a suspect class subject to strict scrutiny. *See, e.g., Griffiths*, 413 U.S. at 718 (finding U.S. citizenship limitation on admission to state bar a denial of equal protection); *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that a state’s fifteen-year residency requirements for welfare recipients and that a state’s conditioning receipt of benefits upon citizenship violated the Equal Protection Clause); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948) (finding unconstitutional state law that prohibited issuance of commercial fishing licenses to persons ineligible for citizenship and was specifically intended to affect Japanese); *Truax*, 239 U.S. at 40-43 (holding state labor law requiring eighty percent of hired workers to be “qualified electors or native-born citizens” of the United States violated the Equal Protection Clause); *cf. Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (*per curiam*) (applying rational basis test under equal protection to uphold statute requiring mandatory retirement at age fifty from state police force); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (granting summary judgment to plaintiff, a braider of African-American natural hair who claimed that as applied to her situation, the state’s cosmetology rules were unconstitutional).

248. At its 2001 convention, Division II voted to discount certain low level professional experience for pre-college students. It is worth noting however, that much of the support for this approach came from those who desired to make it easier to recruit and play foreign student-athletes,

the course in rejecting pay for play and standing against special consideration of athletic ability in the financial aid process.²⁴⁹ And in the same meeting in which the Division I Management Council voted to lift the employment cap for student-athletes, it also excepted some pay for play prior to full time college admission from its amateurism regulations, but did not go as far as Division II.²⁵⁰

Whether the new changes are good for student-athletes remains to be seen. It remains true, however, that changes to recognize and redress legitimate student-athlete concerns have come slowly in the NCAA, complicated by competing financial and parity concerns, particularly at the big time athletic programs. These examples of regulatory debates concerning free speech and the right to work demonstrate the presumption of NCAA control that pervades its legislative approaches and the fact that the perversion of *in loco parentis* remains a key concern for student-athletes.

IV. RESPONDING TO THE PERVERSION OF *IN LOCO PARENTIS*: USING NONPROFIT ORGANIZATIONS TO SUPPORT STUDENT-ATHLETES

I have argued that an enormous difference exists between the controls that colleges and universities exercise over their student-athletes and those that they exercise over non-athlete students. I have further argued that a perversion of *in loco parentis* doctrine in intercollegiate athletics regulation, as well as the bifurcation of educational institutions into athletic and nonathletic venues, has led to this difference in treatment of athletes and nonathletes. While some differences in treatment are justified, too many are driven by institutional interests, financial and otherwise, that operate contrary to student welfare or student rights.

This writer believes that the NCAA and its member institutions can never protect student-athletes adequately. This observation is particularly true in the case of Division I student-athletes, but also applies to a lesser extent to Divisions II and III.²⁵¹ At this point in history, the reasons why have little to do with good

who often have experience playing with teams that receive minimal pay. The new rule bans payment "after initial full-time collegiate enrollment," suggesting that pay before that time is acceptable. See 2001-02 Division II NCAA Manual, *supra* note 178, at 58, 59, 60. It continued some amateurism restrictions on pre-college students including the restriction on preferential treatment based upon athletic ability. *Id.* at 59.

249. See *Division III Charts New Path for Financial Compliance*, NCAA NEWS, Jan. 15, 2001 (Division adopted new compliance provisions and reaffirmed that aid must be consistent with that given to nonathlete students); see also 2001-02 DIVISION III NCAA MANUAL, *supra* note 179 (Division III Manual provisions regarding aid).

250. Division I excepted pay up to the point that it does not exceed expenses. It declined to remove the prohibition against playing with professional players prior to enrollment. See NCAA NEWS, *supra* note 242.

251. While financial interests in athletics may not be as prevalent in the latter two divisions, it remains true that student-athlete interests and institutional interests are not the same as in the days of *in loco parentis*.

or bad intentions. First, the NCAA, the athletic conferences and the other organizations that work together to regulate intercollegiate athletics have as their mission the protection of the interests of their membership. That membership is comprised of educational institutions, not student-athletes. And as the *in loco parentis* doctrine has yielded to a broader conception of student rights, it can no longer be presumed that student interests and institutional interests are the same. When student-athlete and member institution interests conflict, then, appropriately, these organizations must choose to advocate their member interests. Given the diversity of those interests, the NCAA's policy almost always reflects political compromise. The need for compromise may be less significant after restructuring, but it remains. Second, because the NCAA and its conferences are political actors that must balance competing interests among the diverse institutions that are their members, they are inefficient vehicles for student-athlete protection. Student-athlete issues must always be merged into some membership interest in order to be heard. Even when these bodies reach decisions that benefit student-athletes, and sometimes they do, the process that led to those decisions is often a long and arduous one and the relief tends to come in bits and pieces of scattered legislation rather than comprehensive approaches. The tortured road student-athlete issues must take is demonstrated by the aforementioned debates over student-athlete speech rights²⁵² and student-athlete financial aid.²⁵³ Third, as history demonstrates and as I have discussed in this Article, the pressures from media, alumni, and even students, to grow sports programs and to win make it difficult for educational institutions to take the steps needed to ensure student-athlete welfare, even when they know they should. A balancing of student-athlete interests and institutional interests may be the only way to run intercollegiate athletic programs. The problem is that institutional interests are powerfully represented, but there is currently minimal representation of student-athlete interests. Currently, there is no entity that can offer an effective counterbalance to institutional perspectives. Such an entity is needed. Student-athletes need unfettered access to an organization independent of intercollegiate-athletics regulators, but one that values the essentials of a system that attempts to integrate athletics and education. The law has a structure for such an organization, specifically 26 U.S.C. §501(c)(3) which allows the formation of nonprofit organizations for charitable and other purposes.²⁵⁴

252. See discussion *supra*, Part III.A.

253. See discussion *supra*, Part III.B.

254. 26 U.S.C. § 501(c)(3) (1994). The statute provides tax exemption for contributions to entities "operated exclusively for" *inter alia*, "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)" Other uses for nonprofits have been proposed before. In 1993, Professor Leroy D. Clark proposed that civil rights organizations (usually nonprofits) be enlisted to file lawsuits and otherwise advocate on behalf of black student-athletes. Clark argued that black athletes were suffering exploitation that rises to the level of a civil rights violation. See Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J.

Currently, several 501(c)(3)s designed to support amateur athletics exist. However, most include amateur athletics concerns along with a hodgepodge of other concerns (including, for example, support of professional athletes). As I will discuss below, NCAA regulatory restrictions limit the impact of these organizations by limiting the ways in which they can support and communicate with student-athletes. Because of these NCAA limitations, some of these organization have organized around serving both professional and amateur interests in order to remain viable. The most ambitious project to date has been the recently-formed College Athletes Coalition, a movement to form local associations of Division I college football athletes on campuses across the country.²⁵⁵ The nonprofit model proposed in this piece goes further than existing models to take on NCAA restrictions. If student-athlete welfare is truly an interest of the NCAA and its members, the NCAA and member institutions should give their blessings to the project.

A. *Why a Nonprofit?*

Several scholars have recognized the overall unfairness of institutional athletics policies as they relate to student-athletes.²⁵⁶ I have tried to contribute

259, 274 (1993). The focus of the proposed nonprofit mentioned in this Article is not on race-based discrimination, but rather on economic and political empowerment. However, I do agree with Professor Clark that some of the exploitation of black student-athletes does rise to the level of a civil rights concern. In 1997, Melvin Brazier argued that student-athletes should themselves organize into an association. Melvin L. Brazier, Jr., *United We Stand: Organizing Student-Athletes for Educational Reform*, 4 SPORTS LAW. J. 81, 84 (1997). This Article does not assume the formation of an "association" organized by student-athletes themselves. For discussion of unionization proposals, see *infra* notes 257-60 and accompanying text. Finally, in 2001, the Knight Commission suggested the establishment of an independent "Institute for Intercollegiate Athletics" that could monitor intercollegiate athletics and sustain public pressure to maintain amateurism and academic integrity and other values. See KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION 30 (2001).

255. One key issue for this group is year-round medical coverage for athletes to buffer injury during so-called voluntary workouts. See, e.g., Transcript, ESPN, Outside the Lines: Campus Activists, Apr. 29, 2001. Whether this group will evolve into a union or remain a non-union association is unclear. Sam Ross, Jr., *Group Gives Unionization the Old College Try*, TRIBUNE-REV., Apr. 7, 2002 at www.pittsburghlive.com/x/tribune-review/sports/s_65201.html.

256. See, e.g., Kevin Broyles, *NCAA Regulation of Intercollegiate Athletics, Time for a New Game Plan*, 46 ALA. L. REV. 487 (1995); Timothy Davis, *A Model of Institutional Governance for Intercollegiate Athletics*, 1995 WIS. L. REV. 599; Davis, *supra* note 58 (regarding unfairness to minority athletes); C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1089 (1997) (arguing for some form of stipends or other pay for student-athletes); Alfred Dennis Mathewson, Symposium, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83 (2000) (challenging view that educational concerns drive NCAA policy); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631 (1996) (suggesting antitrust treatment of NCAA by courts is too lenient).

to this debate by putting that unfairness in its historical context and offering an explanation for why it has occurred and why it has been sustained. An independent nonprofit, particularly an entity organized under 26 U.S.C. § 501(c)(3), is needed to do what the NCAA and members simply cannot do. Such an organization—or several—with a focus on welfare issues, would provide a counterbalance for analysis of those policies heavily affected by institutional financial and parity considerations.

Such a nonprofit should be organized on the assumption that keeping a strong link between education and campus athletics is highly desirable. The link is important for several reasons. The first and foremost is the lifelong value of education itself and the unique value of education within the collegiate setting. Most student-athletes are young people with only limited timespace in which to pursue education within that setting. A commitment to collegiate education is needed to counter the forces that would sacrifice this experience—an experience which has long-term financial and intangible values—for short-term payoffs that may ultimately undercut the financial and personal futures of student-athletes. Without this link between education and athletics, this writer believes that term “amateur” is meaningless in the collegiate setting. Indeed, more exploitation could follow if educational institutions were permitted to shuttle student-athletes off into “campus minor leagues” from which the institutions draw profits with no corresponding obligation to provide a total educational experience. At the same time, a nonprofit must define education broadly to include life skills and other training and it must seek to rethink what aspects of the pure amateurs’ model are worth preserving and which are outdated or never had significant value.

The nonprofit option has advantages over unionization, an option suggested by some.²⁵⁷ Only “employees” may form unions, but institutions have long resisted the characterization of student-athletes as employees because that may result in other obligations as well, such as the obligation to pay workers’ compensation.²⁵⁸ A nonprofit is also easier to set up than a union, the latter

257. In the 1980s, Dick DeVenizio, a former basketball player at Duke University, and head of the Major College Players Association, unsuccessfully argued for a union of college athletes. *Sidelines*, CHRON. HIGHER EDUC., Dec. 3, 1986, at 34; see also Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 251 & nn.309-19 (1990) (considering unionization option).

258. Several courts have held that a student-athlete attending a college or university on an athletic scholarship is not an “employee” of the institution for the purpose of entitlement to workers’ compensation benefits for injury or death sustained during the course of the athletic activity. See *Graczyk v Workers’ Comp. Appeals Bd.*, 229 Cal. Rptr. 494 (Ct. App. 1986); *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983); *State Comp. Ins. Fund v. Indus. Comm’n*, 314 P.2d 288 (Colo. 1957); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983). But see *Univ. of Denver v. Nemeth*, 257 P.2d 423, 426 (Colo. 1953) (rejecting university’s contention that student-athlete’s campus job and meal plan were offered exclusively by reason of his being a student; court referred to testimony in the record, including that of the football coach, showing that the student’s employment was dependent on his playing football); *Van Horn v. Indus. Accident Comm’n*, 33 Cal. Rptr. 169, 172-73 (Ct. App. 1963) (finding prima facie

requiring the identification of bargaining units and elections to select an exclusive bargaining agent.²⁵⁹ At the same time, the nonprofit structure can recognize the differences among student-athletes; several nonprofits could be formed or one could be split into divisions. The structure even leaves ample room for student-athletes who may conclude that their own interests are well served by the present structure of strong institutional control and thus choose to remain unaided by a nonprofit. Nonprofits also have broader access to the courts than unions. Union procedures for resolution of grievances are often circumscribed by the collective bargaining agreement with the employer. In seeking substantial legal redress, unions may be required to file their grievances first with the National Labor Relations Board and may be limited in the first instance in their judicial access.²⁶⁰ The formation of a nonprofit does not exclude the potential for future classification of student-athletes as employees and their organization into unions, but the idea offers a middle ground that provides representation without the objections that can be raised against unionization.

The nonprofit option makes sense because the nonprofit structure already exists in abundance in amateur athletics and by granting tax exemption status, the law has recognized the positive role of such organizations. The Black Coaches Association is, for example, a 501(c)(3) organization primarily made up of African American coaches.²⁶¹ Similarly, the Women's Sports Foundation is a 501(c)(3) dedicated to enhancing the sports experience of girls and women. It invites anyone to be a member, including, presumably student-athletes.²⁶² The NCAA itself is a nonprofit.

Moreover, the NCAA has already demonstrated a willingness to work with other nonprofit organizations on matters related to athletics. Indeed, each year the NCAA Foundation provides substantial financial assistance to athletic-oriented, independent, nonprofit organizations. For example, in the fall of 1995, the NCAA approved grants of \$50,000 and \$35,000 respectively to the National

showing of an employment contract where there was evidence that the student had received "scholarship" money, as well as money directly from the football coach where record did not show any denial by the football coach that he had made a contract with the student).

Media references to this issue include Bill Minutaglio, *Former TCU Football Player Loses Bid for Workers' Comp: Waldrep Says He Was an Employee When Paralyzed in '74*, DALLAS MORNING NEWS, Oct. 21, 1997, at 24D, 1997 WL 11529554 (reporting that a Texas jury ruled that, contrary to the finding of the Texas Worker's Compensation Commission, a TCU football player was not employee when he was injured in 1974); see also John Bacon et al., *Jury: Injured College Athlete Ineligible for Workers' Comp*, USA TODAY, Oct. 21, 1997, at 3A, 1997 WL 7017328.

259. See National Labor Relations Act (NLRA), 29 U.S.C. § 159(a) (1994).

260. E.g., 29 U.S.C. § 160(a) (granting jurisdiction over certain labor matters in the first instance to National Labor Relations Board).

261. See also http://www.bcasports.org/about_1.asp (history and 501(c)(3) status).

262. See generally <http://www.womenssportsfoundation.org>; see also <http://www.womenssportsfoundation.org/cgi-bin/iowa/about/more.html> (founding and (501(c)(3) status); <http://www.womenssportsfoundation.org/cgi-bin/iowa/about/article.html?record=28> (membership open to anyone).

Association of Basketball Coaches and the Women's Basketball Coaches Association; a "\$6,000 grant in 1995-96 to the U.S. Women's Lacrosse Coaches Association for officiating-improvement activities," and a \$2000 grant "to the National Association of Collegiate Gymnastics Coaches (Men) to assist with the compilation of statistical information."²⁶³ The NCAA has also formed cooperative relationships with a number of foundations that have as their purpose the promotion of women's sports' issues. For example, the NCAA's Gender-Equity Task Force received consulting assistance from organizations such as the National Women's Law Center, the Office for Civil Rights, and the Women's Sports Foundation.²⁶⁴ And of course, the NCAA has cooperated with professional sports unions on numerous projects.

The NCAA constitution also has long recognized the value of its relationships with nonprofits and other groups through a category of "affiliated members." These affiliated members are permitted to send a single delegate to the NCAA convention, but are not permitted to vote.²⁶⁵ The affiliated member list has included a broad group of associations concerned with matters relating to athletics and representing the interests of persons affiliated with athletics such as registrars, financial aid officers, and coaches.²⁶⁶ It is not obvious that a proposed nonprofit concerned with student-athlete issues should seek affiliated status. Because affiliated members must align themselves with NCAA principles, such status could compromise the organization's independence as a constructive commentator and critic of intercollegiate athletics policy.²⁶⁷ However, the presence of the affiliated member category demonstrates the NCAA's past cooperation with nonprofit organizations. The NCAA has also

263. *Executive Committee Minutes*, NCAA REG., Aug. 30, 1995, at 1.

264. FINAL REPORT OF THE NCAA GENDER-EQUITY TASK FORCE 16 (1993).

265. 1996-97 NCAA MANUAL, *supra* note 128, at 15 (describing the rights and privileges of affiliated membership); *see also* 2001-02 DIVISION III NCAA MANUAL, *supra* note 179, at 14-15 (same).

266. The 1995 NCAA Convention Proceedings lists twenty-four affiliated members. These include: (1) groups representing particular sports or sports events (e.g., Amateur Softball Association, Basketball Hall of Fame Tip-Off Classic, U.S. Olympic Committee, USA Basketball, USA Volleyball, and Metropolitan Intercollegiate Basketball Association); (2) groups representing coaches (e.g., American Baseball Coaches Association, American Football Coaches Association, American Volleyball Coaches Association, College Swimming Coaches Association of America, Inc., National Association of Basketball Coaches, National Association of Collegiate Gymnastics Coaches, National Softball Coaches Association, U.S. Track Coaches Association, and Women's Basketball Coaches Association); and (3) groups representing administrative personnel concerned with the issues that the NCAA addresses (e.g., American Association of Collegiate Registrars and Admissions Officers, Division I-A Athletics Directors Association, National Strength and Conditioning Association, National Association of Academic Advisors for Athletics, and National Association of Collegiate Women Athletic Administrators). NCAA, 1995 NCAA CONVENTION PROCEEDINGS 58 (1995). Some of the later proceedings include similar lists.

267. Affiliated members must observe the bylaws and principles set forth in the NCAA constitution and bylaws. *See, e.g.*, 2000-01 NCAA DIVISION I MANUAL, *supra* note 177, at 15.

regularly permitted nonmember visitors, including press groups and associations, to attend its convention and observe proceedings.²⁶⁸

These facts demonstrate that the NCAA has had experience with nonprofits and has even, on occasion, welcomed cooperation with them. They also demonstrate that just about everyone directly involved in intercollegiate athletics has some organizational voice that can uniquely represent the concerns of their groups and that they can call upon to affect athletics policy—schools, coaches, financial aid representatives, officials—that is, everyone except student-athletes.

B. What Would a Nonprofit Do?

As previously stated, nonprofits already perform a host of work in the amateur athletics world. But eliminating the perversion of *in loco parentis* is a key starting point for nonprofit expansion to assist student-athletes in a real way. In this writer's view, the primary need for a nonprofit organization rests among those facing the most restrictions. These appear to be athletes in revenue-producing sports and those in nonrevenue-producing sports who are tied to rules *designed with* revenue-producing athletes in mind.

The possibilities for nonprofit involvement in assisting these student-athletes are endless. A nonprofit could, in fact, do the same things for student-athletes that the nonprofits that assist other groups involved in athletics do. For example, it could preliminarily review NCAA proposed policies and serve as a thinktank for new proposals to better the student-athletes' situation. It could identify problems and advocate—and agitate for—changes. A nonprofit could monitor educational and medical support at institutions to ensure that it is both of high quality and consistent for student-athletes, rather than dependent upon the institution that the student-athlete attends. It could provide educational information, including leadership training.²⁶⁹ Such programs should be seen not as "pay for play," but as *restitutional* and *compensatory* programs, that is, programs to provide for needs created by athletics involvement or to restore experiences, opportunities and benefits that student-athletes must forgo because of that involvement.

Should the NCAA or member schools ever decide to approve stipends to student-athletes or to offer some other additional financial aid to them, a nonprofit could serve as an independent vehicle for the distribution of those funds, and even as a trustee. This writer has suggested, for example, that instead of direct stipends, which might be at very low levels, or perhaps in addition to stipends, student-athletes should be entitled to contributions from member institutions similar to the contributions an employer would make to individual

268. See 1996-97 NCAA MANUAL, *supra* note 128, at 32-33 (allowing members or nonmember institutions and organizations to send visiting delegates who lack voting privileges and are denied the right to participate).

269. While NCAA institutions have in recent years offered "life skills" programs, a nonprofit could offer such programs in an environment untainted by clear conflicts of interest. See generally Carter, *supra* note 4.

retirement accounts. Such a plan would encourage student-athletes to save for the future while teaching them financial planning and investment principles.²⁷⁰ Whatever the approach, removing the power over any such assets from NCAA and institutional jurisdiction would better serve interests of student-athletes, the institutions, and athletics in general.

While nonprofit organizations are restricted from political lobbying activity, as the NCAA itself has demonstrated, nonprofits can engage in much information-providing activity on legislative matters without violating lobbying laws.²⁷¹ For example, a nonprofit could provide information to Congress and governmental entities on public issues relevant to student-athlete interests in athletics. Additionally, a nonprofit could review or propose governmental legislation to provide alternative perspectives on the impact on student-athletes. A nonprofit could support the student-athlete organization with their own voices on issues and conduct the research necessary to assess and monitor whether those voices are being heard and, indeed, what they are saying.

Certainly, while student-athletes have many interests in common, there are conflicts that raise the question of whether a single nonprofit is workable. From the institutional perspective a single nonprofit might be best because there would be only one institution to deal with and that institution would be required to compromise among competing student-athlete interests. But this writer sees no reason why one should reasonably insist on monopoly control over student-athlete issues. Indeed, there are several coaches associations asserting the interests of various subgroups of coaches, for example, black coaches and female coaches and tennis coaches. Why then should student-athletes be more limited in their options? One could make an excellent argument that some groups need an organization more than others. For example, for some, football players or African American athletes might fall into the category of those suffering most under the perversion of *in loco parentis*. On the other hand, existing structures that target the interests of specific groups, like the Women's Sports Foundation, can continue to support those groups. The financial support for such an enterprise in the market and the needs of student-athletes will be sufficient to determine whether one nonprofit or more than one emerges. Moreover, multiple nonprofits can be involved in the enterprise at different levels.

C. Funding

There are numerous sources of funding for such a nonprofit. One very obvious source is former student-athletes who desire to offer support. Another is contributions from both for-profit and not-for-profit organizations. Governmental grants and general public support are other options. Finally, of course, the NCAA and member institutions themselves have means of granting some support to such an organization. It would be best, of course, if such an

270. See *id.* at 96-97.

271. The NCAA has a Washington D.C. office that regularly communicates with Congress on key issues relevant to athletics. See *id.* at 24-25.

organization were broadly-supported. Broad support would avoid concerns that the group answers to only a small group of donors and also would achieve the preferred IRS exemption classification of a "public charity."²⁷²

D. NCAA Regulatory Barriers: In Loco Parentis—Again!

There are definite regulatory barriers to what I propose here. At the heart of the difficulty are two broadly-defined NCAA principles: the principle of amateurism and the principle of institutional control.²⁷³ Let us discuss them in turn.

As the *Sports Illustrated* matter indicated, the definition of amateurism embraced in the NCAA rules is exceedingly broad. The rules provide that amateurs may not receive compensation for their athletic ability.²⁷⁴ By providing educational or other services at no charge to student-athletes only, might my nonprofit be charged with providing a benefit based upon their athletic ability? Of course, one can only reach an affirmative conclusion if one embraces the NCAA's very broad definition of what it means to "use" one's athletic ability.²⁷⁵

For illustration, consider the following example. Suppose a nonprofit initiated a lawsuit charging institutions and the NCAA with violations of student-athlete rights. Suppose that, because these students lacked money, the nonprofit arranged to cover the cost of the representation or hired a lawyer who would take the case free of charge, perhaps relying upon the hope of a statutory fee award for payment. Could this assistance be considered "compensation" for athletic skills, a violation of NCAA rules on amateurism?²⁷⁶

What of the principle of institutional control? Would an institution be penalized if it "permitted" its student-athletes to be involved with a nonprofit (assuming the nonprofit's activities with student-athletes are not specifically exempted by existing rules)? NCAA rules require member educational institutions to assert control over their athletic programs. For example, when any booster of the institution violates NCAA rules, the institution has violated the principle of institutional control by failing to prevent the act.

Indeed, a person can become a booster—or more properly, a representative of institutional interests—without being an employee of the institution, without

272. Public charities are broadly-supported entities under the Internal Revenue Code. 26 U.S.C. § 509(a)(2) (1994). By contrast, private foundations, while exempt, are not broadly supported and, thus, are subject to more taxation, restrictions and reporting requirements than public charities. 26 U.S.C. § 507-509.

273. See, e.g., 2001-02 DIVISION I MANUAL, *supra* note 177, at 3 (principle of institutional control); *id.* at 5 (principle of amateurism). A "general" principle sets out that the legislation shall be designed to vindicate the specific principles. The specific principles follow. For the other principles, see also *id.* at 3-5; Carter, *supra* note 4, at 13-14.

274. 2000-01 NCAA DIVISION I MANUAL, *supra* note 177, at 72-74.

275. See *id.* at 72 (stating the rule covers both "direct[]" and "indirect[]" use). Consider also the *Sports Illustrated* case discussed *supra* Part III.A.

276. See 2001-02 NCAA DIVISION I MANUAL, *supra* note 177, at 72.

the institution's formal permission and without actually recognizing that he or she has become so. The person need only act to benefit the institution's athletic program in a way that violates the rules. The rationale behind this rule is not so much amateurism, but parity. The theory is that when an institution's athletic interests are so advanced, that institution gains a competitive advantage over other institutions.²⁷⁷ In response to some resistance, institutions have retreated somewhat from these broad interpretations. For example, when it could be shown that the athlete had a preexisting personal relationship with the person providing the benefits and that the benefits were thus not athletically-related, the

277. This was the approach in the case involving Dan Calloway, a Florida youth sports director who provided money to student-athletes. Calloway was not a formal member of a booster club and claimed that he provided the money solely because he had an interest in helping minority student-athletes. See, e.g., Matt Winkeljohn, *Georgia's NCAA Probation*, ATLANTA J. CONST., Mar. 6, 1997, at 4G (mentioning Calloway by name). However, in an investigation, the NCAA infractions committee alleged that the unnamed Calloway had in fact become a booster in November 1993 when he obtained high-school transcripts of prospects and provided them to Georgia football coaches.

The individual later paid for and helped several prospects with official visits to Georgia and attendance at Georgia's football camps. The committee received no evidence that the Georgia coaching staff knew about the funds the booster provided to the prospects. However, Georgia did receive a recruiting advantage from the efforts of the booster.

News Release, NCAA, *University of Georgia Receives Two Years Probation for NCAA Violations* (Mar. 5, 1997), <http://www.ncaa.org/releases/makepage.cgi/infractions/1997030501in.htm>. Having found that Calloway had acted as a booster with respect to five athletes, the NCAA then determined that all of his actions with respect to student-athletes, even those as to whom he did not specifically engage in "recruiting," were violations. Among the support that Calloway was found to have provided was the following:

He obtained high school transcripts of five prospects for Georgia's football coaches.

He provided cash to nine prospects on a number of occasions. He purchased meals for five prospects on two occasions. He paid for five prospects to attend the university's football camp and paid for three prospects to visit the Georgia campus.

From August 1994 to January 1995, the booster paid at least \$7,000 for tuition, room, board and spending money to a walk-on football player.

Id. In addition to being placed on two years probation, the Georgia football program suffered a reduction in the number of athletic scholarships it could offer. *Id.*

Calloway was also implicated in another investigation involving Michigan State University. News Release, NCAA, *Michigan State University Receives Four Years Probation for NCAA Violations* (Sept. 16, 1996) (noting that Calloway did not intend to become an institutional representative but that coaches sought him out because of his prominence in community and used him to a recruiting advantage), <http://www.ncaa.org/releases/makepage.cgi/infractions/1996091602IN.htm>. Michigan State also suffered a reduction in scholarships. *Id.* Calloway has consistently claimed that he was not representing any university's interests, that he was helping minority student-athletes in general, and that if a student asked his opinion about a particular school he was and is free to give it. See, e.g., Winkeljohn, *supra*.

NCAA has suggested no penalty would be warranted. Generally, however, such relationship can only be proven by the student-athlete taking the risk and then suffering an investigation.²⁷⁸

Nevertheless, the institutional control rule could be a problem for my nonprofit if its activities conflict with NCAA rules. For example, could this organization be characterized as a "booster" if it identified a particular college's assistance to athletes as inadequate and provided academic support to those athletes?

Consider yet another quandary. Could student-athletes affiliate with an organization that obtains a substantial part of its support from contributions by professional players (most of whom used to be student-athletes) without running afoul of NCAA amateurism rules or without subjecting their institutions to institutional control objections? Would substantial financial support from professional players cause the NCAA to categorize the group as a "professional sports organization?" Student-athletes are prohibited from receiving support from professional sports organizations unless expressly allowed by the NCAA.²⁷⁹ Certainly, it is in the nonprofit's interest to receive broad financial support and not be beholden to a small group of donors.²⁸⁰ But some of its donors might very well be classes of persons to whom the NCAA and its members might object if these persons had direct relationships with student-athletes. On the other hand,

278. Compare the Calloway cases, *supra* note 277, to the case involving Ed Martin's contacts with University of Michigan players. As reported in the Detroit News, an internal report by the University of Michigan prior to the infractions committee action found that Martin, in all likelihood, gave some players or their families rent for apartments, party rooms in hotels, free transportation, basketball shoes, and other goods. Jeff Taylor, *Michigan Still Searching for Answers*, DETROIT FREE PRESS, July 25, 1997. On the other hand, the university's internal investigation report indicated that Martin knew the players for years before they went to Michigan and did not help Michigan recruit them. Thus, it argued that Martin was not technically a representative of the university's athletic interests. Fred Girard, *U-M's Fate Tied to Martin: NCAA Will Study Probe Results, Interpret His Status with University*, DETROIT NEWS, Oct. 10, 1997. It did, however, find other violations of NCAA rules and responded by dismissing Michigan's head coach. Nicholas J. Cotsonika, *Ex-Michigan Coach Responds to Firing; Fisher: "I Will Not Apologize for Who I Am"*, WASH. POST, Oct. 14, 1997. In 2000, Martin was prosecuted for alleged gambling operations and alleged money laundering. The basis for the charges included the 1997 incidents involving Michigan student athletes. Ben Schmitt et al., *U.S. Charges Martin Ran a Gambling Ring*, DETROIT NEWS, Mar. 22, 2002.

279. 2000-01 DIVISION I NCAA MANUAL, *supra* note 177, at 69. But see NCAA Rule 12.1.1.4.7, *id.* at 72 (allowing charities that receive funding from professional sports organizations to pay for low-income, at-risk student-athletes' attendance at a "camp or clinic" (but not to pay for prospective student-athletes) and allowing payment only for reasonable expenses, apparel and equipment). Note that the rule seems to assume that the camp would be an athletic one. Note also that the rule refers to charities *paying for* camps; it is not targeted toward camps that are *run by* the charities. The reader is reminded that institutions and coaches often sponsor their own athletic camps. All such camps, of course, are subject to NCAA limitations on "outside activities."

280. 26 U.S.C. § 501(c)(3) (1994).

institutions, with the NCAA's blessing, have worked closely with professional sports organizations and permitted students to have contact with professional sports organizations when it promoted, or at least, did not jeopardize, the NCAA's own interests.

One can argue convincingly that there are individuals and organizations with bad intentions who should be kept away from student-athletes. Furthermore, it is fair to say that schools have a legitimate interest in the "amateur" game and, therefore, have the right to set reasonable terms for participation in it.²⁸¹ On the other hand, as I have stated, historically amateurism had two sides: both student and the institution had responsibilities. Chief among the institution's responsibilities was to provide athletics for all and to avoid commercialization of athletics and student-athletes. It is undeniable that NCAA institutions have abandoned this earlier strong commitment to amateurism,²⁸² and, that commercialism and control of athletics (with various ends) has become a key concern. Therefore, in this new environment, it is time to consider what parts of amateurism regulations applied to student-athletes can still be justified, not as an afterthought tagged on to discussions about institutional rights, but as a central question.²⁸³ It is also time to acknowledge that in the search for "control," the NCAA and its members have swept far too broadly.²⁸⁴

When we speak of the potential of nonprofits, a key concern for NCAA members who are publicly-funded institutions should lie the free speech area. The Supreme Court has recognized that the First Amendment assures not only the freedom to speak but also the freedom to associate and that the freedom to associate in an organization for the advancement of a point of view is a fundamental right.²⁸⁵ Because of this freedom, the government and its entities cannot forbid membership in a group. Generally, it also cannot require that the organization reveal the names of the members of such a group.²⁸⁶ Such required revelations are barred because the fear of reprisal will have a chilling effect upon membership and upon individual association rights. The courts have also long recognized that the First Amendment includes the right to receive information as well as provide it. Thus, in *Lamont v. Postmaster General of the United States*,

281. See discussion of the right/privilege distinction *supra* note 172 and accompanying text.

282. It may be a little more than ironic that the principle of amateurism used to be the very first of the "specific" principles; see discussion *supra*, Part III.B, but today the principle of institutional control is the first "specific" principle, while the principle of amateurism is number nine on a list of sixteen. 2001-02, DIVISION I NCAA MANUAL, *supra* note 177, at 3-5. See also *supra* notes 231-34 and accompanying text (concession to consider athletic ability in awarding scholarships).

283. See discussion *supra*, Part III.B (obligation of institutions under amateurism).

284. See generally Carter, *supra* note 4, for a survey of the battle for constitutional control of athletics.

285. E.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (regarding freedom to contribute money to promote common beliefs), *motion granted* by 424 U.S. 936 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

286. *Patterson*, 357 U.S. at 462.

the Court struck down a federal law permitting the postmaster to pull and hold mail appearing to be communist propaganda until the addressee specifically returned a reply card asking that it be delivered.²⁸⁷ *Lamont* held that the requirement of returning the card imposed an undue burden on the individual's right to receive information.²⁸⁸ The Court has made it clear that the "right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."²⁸⁹ Indeed, in a concurring opinion in *Lamont*, Justice Brennan observed the link between the right of free speech and the right to receive information stating that "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."²⁹⁰

As I have noted earlier,²⁹¹ these First Amendment rights apply to students as well.²⁹² Indeed, the Supreme Court has recognized the role of free speech on campuses as central to the educational mission.²⁹³ Thus, educational institutions will have difficulty justifying broad restrictions on speech and association as serving some kind of "educational" purpose. The courts have been particularly suspicious of prior restraints on speech that require that speakers receive license to speak before speaking. Thus, any requirement that the student check with the institution first before speaking or associating could operate as a presumptively invalid prior restraint on speech.²⁹⁴

Certainly, where the speech is greatly disruptive courts have been willing to permit restrictions on access.²⁹⁵ However, there is no legitimate reason for assuming that student-athlete involvement with a nonprofit would be disruptive in the sense of these cases.

It must further be remembered that the association and speech rights belong not only to the athlete but also to the nonprofit. It has a right to provide information as much as student-athletes have the right to receive it.²⁹⁶

287. 381 U.S. 301 (1965).

288. *Id.* at 307.

289. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).

290. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

291. See discussion *supra* Part III.A.

292. See, e.g., *Pico*, 457 U.S. at 870-71 (finding that board of education may not remove books from school library approved by parent-teacher group merely because board disagrees with views expressed in them).

293. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

294. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

295. See, e.g., *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) (holding that public library could bar person from library for failure to observe rules of conduct while inside library); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (upholding university action against teacher who belittled colleagues and initiated frequent disputes).

296. Reaffirming this view, the Supreme Court decided at press time *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 122 S. Ct. 2080 (2002) (upholding society of Jehovah's Witnesses challenge to prohibitions and limitations on pamphleting and soliciting at

Of course, only state actors can be sued for constitutional violations. The NCAA has successfully argued that it is not itself a state actor and has won dismissal from many cases brought against it.²⁹⁷ As a result, in the past, publicly-funded institutions were likely to find themselves the sole defendants in lawsuits based on constitutional grounds. However, as I have argued in *Student-Athlete Welfare*, this greater delegation of legislating power in Division I after restructuring and other factors now make the NCAA's assertion of non-state-actor status vulnerable.²⁹⁸

Privately-funded institutions also may not be exempt from concerns discussed here. As noted above, after the student protests of the 1960s, many private colleges adopted statements of student rights and responsibilities that essentially protected student freedom of speech and association.²⁹⁹ Arguably, these protections are a part of the student's contract with the college or university.³⁰⁰ Indeed, as also noted earlier, accrediting agencies often seek assurances of an environment that welcomes free speech and association as a prerequisite to accreditation.

All of these considerations support a view that students should not be prohibited from voluntarily joining such an organization (if it is a membership organization), or, alternatively, taking advantage of its benefits. They should be permitted to join regardless of who the other members are, so long as all members support its purposes. Also, student-athletes should not be required to inform their institutions of their membership, and the organization should not reveal its membership lists to these institutions. The schools should not be permitted to condition student-athlete eligibility on a requirement that the student provide information about the organization's activities or other members. Students should be able to receive from such an organization any benefits directed at remedying perceived abuses in athletics, free of institutional meddling. The First Amendment supports this view, but also there may be justification for defense of such associations and interactions of other legal fields.³⁰¹

private homes); *see also* NAACP v. Button, 371 U.S. 415 (1961) (rejecting on First Amendment grounds state of Alabama's refusal to grant business license to NAACP and its ban on NAACP activities in that state).

297. *See* NCAA v. Tarkanian, 488 U.S. 179, 182 (1988).

298. *See* Carter, *supra* note 4, at 81-89 (arguing for a narrow reading of *Tarkanian* and suggesting that the new legislative structure under restructuring may make NCAA vulnerable to claims requiring state action).

299. *See supra* notes 114-26 and accompanying text.

300. *See supra* notes 118-19 and accompanying text.

301. The legal possibilities are too numerous and too complicated to explore here. However, it may briefly be said that interference with an organization's attempts to reach student-athletes may have an effect on the marketplace that would have antitrust implications. Despite its special status in the law, the NCAA has been the subject of successful antitrust challenges. *See* Carter *supra* note 4 (discussing *Law v. NCAA* and *NCCA v. Board of Regents*). State and Federal Civil Rights statutes and conspiracy law may also be implicated.

Perhaps institutions could argue that unfettered associational opportunities with nonprofits could jeopardize student welfare and amateurism because, absent institutional monitoring, student-athletes will fall prey to jackals. Perhaps it would be argued that the "product" that is intercollegiate amateur athletics cannot exist without such far reaching restraints on student conduct, and that competitive parity principles would be jeopardized as institutions sought to take advantage of this brave new world.³⁰² But the historical failure of member institutions to protect student-athlete welfare arouse suspicions about institutional supervision of student-athletes. Some would compare it to the proverbial wolf guarding the henhouse. NCAA position changes on amateurism over the years challenge assumptions about amateurism's unchangeable nature and its sacred status. Moreover, while the NCAA may be free, as a private entity, to determine through its divisions what it believes amateurism is, it should not be free to determine the fundamental rights of student-athletes in the regimes it establishes. It should also not have the special aid of the courts in upholding overly-broad standards that are driven primarily by commercial interests.

As I have argued elsewhere in *Student-Athlete Welfare*, the rationale for strong deference to educational institutions in intercollegiate athletics is suspect where student-athlete controls are concerned.³⁰³

Perhaps one solution to preserving NCAA values and interests is for the NCAA to enter into agreements with other nonprofits. And even if some measure of control is truly essential to preserving amateurism in intercollegiate athletics, (and if having reached that conclusion, we decide that we still wish to preserve it), the perverted form of *in loco parentis* must be replaced with a new conception of student-athlete/institution rights. Perhaps that conception will be a modified *in loco parentis doctrine* more akin to contract and duty and more closely resembling the legal relationships that exists between institutions and their non-athlete students. Perhaps in a system that is supposed to be tied to education, we really do not wish student-athletes to have to fend for themselves in the way that professional-athletes must do, particularly on matters of safety.³⁰⁴ But if *in loco parentis* to any degree remains, the new conception must also recognize that with any degree of control, comes a duty to protect. And the new conception must have teeth, affording student-athletes a real remedy, legal or otherwise, if the institution fails in its duty. Better yet, the new conception must allow outside groups to provide assistance to the student-athlete and the NCAA to avoid situations which would lead to litigation. Nonprofits can play a vital role in this mission.

302. The argument has been made in the antitrust context. As I have noted elsewhere, the majority in *NCAA v. Board of Regents*, 468 U.S. 120 (1984), while rejecting NCAA restraints on its members in that case, opined that some horizontal restraints on commercial activity are necessary if the "product" of intercollegiate athletics is to be available at all. However, as I also indicated, whether restraints, antitrust or otherwise, are necessary in a given case, turns on how one defines "the product" to be preserved. See Carter, *supra* note 4, at 72-73.

303. See generally *id.* at 69-95 (discussing judicial deference).

304. Taking such an approach has broad implications for other doctrines such as assumption of risk.

CONCLUSION

I have claimed that the original *in loco parentis* doctrine had three legs: a control leg, a welfare leg, and a deference leg. As athletics grew in importance at educational institutions, the control leg was strengthened and the welfare leg weakened. With continued judicial deference to institutions, this phenomenon resulted in a distorted *in loco parentis* doctrine and an imbalance in the relationship between institutions and their student-athletes. This trend was contrary to the larger national trend toward reduced control of students and less judicial deference to exercises of that control.

Intercollegiate athletics continues to operate in distorted *in loco parentis* space. Arguably financial concerns have always played a role in the *in loco parentis* doctrine. For example, when Berea College, discussed above, forbade students to have their meals off campus, one of the concerns was that financially, Berea could not continue to provide a meal plan if students were not required to participate in it.³⁰⁵ However, difference between the world of 1930 and the world of today is that the *in loco parentis* doctrine has long been abandoned with respect to the larger student population. It is unlikely today that any educational institution could successfully defend in court what Berea did either against student challenge or against litigation. Another big difference between Berea's control and that of institutions controlling intercollegiate athletics is that it does not appear that Berea continued a meals program purely because of its financial value to the university. Instead, Berea likely viewed the policy of group meals as intricately tied to its mission of providing students with an education in a collegiate setting.

It is possible to argue that, in the name of keeping intercollegiate athletics an integral part of education, institutions should be permitted to exercise broader controls over student-athletes than over nonathletes. Evidence suggests that without some controls intercollegiate athletics can get out of hand. It is also possible to argue that amateurism has value. But to sustain these arguments lawyers and the courts must not only define what they mean by "amateurism," they must also redefine the relationship between the student-athlete and his or her institution. If intercollegiate athletics is to remain under the control of institutions, the welfare leg of *in loco parentis* must be rebuilt or replaced with some suitable modern substitute—and the control and deference legs of the doctrine must be shortened to restore its balance. Whatever happens, as long as commercialism plays a major role in intercollegiate athletics, student-athletes will need and have a right to access to information and assistance outside of their institutions. A nonprofit, or perhaps a group of several nonprofits, is the most viable option for providing that information and assistance.

305. See *Gott v. Berea Coll.*, 161 S.W. 204, 207 (Ky. 1913).

QUIETING THE GUILTY AND ACQUITTING THE INNOCENT: A CLOSE LOOK AT A NEW TWIST ON THE RIGHT TO SILENCE

GORDON VAN KESSEL*

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* Professor of Law, University of California, Hastings College of the Law. The author wishes to thank Hastings Professors Vikram Amar, Rory Little, and other colleagues who offered helpful comments and suggestions.

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INTRODUCTION

A. *The Ascending Right to Silence*

The right to silence is on the upswing on both sides of the Atlantic. Throughout Europe, there is near-universal recognition of a right to silence and a privilege against self-incrimination that applies to both the pretrial and trial stages of a criminal case.¹ Those aspects of the right to silence that require advice of the right and prohibit adverse inferences from silence also are generally accepted. Most civil law countries of continental Europe have adopted rules that require suspects be informed of the right to remain silent prior to questioning as well as rules that prohibit courts from considering defendant's silence as evidence of guilt,² although in practice such guarantees often are not as strong as

1. The European Court of Human Rights has repeatedly stated that, although the European Convention on Human Rights contains no explicit guarantee of a right to silence, "there [could] be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 [which guarantees the right to a fair and public hearing]." *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29, ¶ 45 (1996); *see also* *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. 313 (1997); *Funke v. France*, 16 Eur. Ct. H.R. 297 (1993). The court's language in *Funke*, connecting the right to silence with police interrogation, and its later reliance on the privilege in *Saunders*, when dealing with official compulsion under oath, suggests the court perceives different roles for the silence right and the privilege. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

There is, however, an explicit privilege against self-incrimination in the United Nations International Covenant on Civil and Political Rights (ICCPR). Article 14(3) states that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees . . . (g) Not to be compelled to testify against himself or to confess guilt." International Covenant on Civil and Political Rights, Dec. 19, 1966, Article 14, 999 U.N.T.S. 171, 177.

2. *See* Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure*

in America³ due to differences in legal and social cultures and between adversary and inquiry procedures.⁴ Only in England, Israel, and a few other countries are factfinders legally permitted to draw inferences of guilt from silence during police questioning and at trial.⁵

In America, the right to silence is also on firm ground. *Miranda* rules, once thought to be in jeopardy, have been extended by the U.S. Supreme Court in some respects⁶ and recently were reaffirmed and strengthened in *Dickerson v. United States*.⁷ Furthermore, the Supreme Court recently renewed its

Rule, 14 MICH. J. INT'L L. 171, 219-20 (1993); Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581 (2001); Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 809, 821-23, 832 (1998).

3. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

4. Unlike *Miranda* rules, for example, in most European countries a defendant's assertion of the right to silence generally does not operate to shut down interrogation and the police may continue to ask questions. See Van Kessel, *supra* note 2, at 810, 821-23, 832. Furthermore, in criminal trials in continental Europe it is a rare event for the defendant not to speak and respond to questions. *Id.* at 833. In some countries, particularly in France, the right to silence has more theoretical than practical significance. A French lawyer recently told me that I am wasting my time on the right to silence which is regarded in France as a foreign, English-style concept. For a fascinating example of this point in the context of a French murder trial, see Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791, 812 (pointing out that the spotlight of the French trial is "squarely on the defendant" and describing how the presiding judge closely examines the accused to serve the central purpose of the French trial—finding out what happened and why).

5. See Van Kessel, *supra* note 2, at 821-23, 832. The European Court of Human Rights has found that with certain protections such use of silence does not violate the right to a fair trial under the Convention. See also *Condron v. United Kingdom*, 31 Eur. Ct. H.R. 1 (2000) (holding that permitting the factfinder to consider defendant's silence is not of itself incompatible with the right to a fair hearing provided silence is not the sole or main basis for the conviction); *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29, ¶ 47 (1996) (holding that adverse inferences may be drawn from silence "in situations which clearly call for an explanation" from the defendant if the assistance of a lawyer is provided when defendant must decide whether to speak).

6. The Supreme Court has held that when a defendant asserts his right to counsel, he may not be subjected to further police questioning until counsel has been made available to him unless defendant independently initiates further conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). The *Edwards* prohibition on future questioning was later extended to offenses wholly unrelated to the crime as to which the suspect has requested counsel. *Arizona v. Roberson*, 486 U.S. 675 (1988). Professor Yale Kamisar described *Edwards* as "in effect [establishing] a new 'prophylactic rule' that built on and reinforced *Miranda*'s 'prophylactic rules,'" and regarded *Roberson* as reaffirming and reinvigorating *Edwards*. Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 474, 499 (1999).

7. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that because *Miranda* is a "constitutional decision" it may not be overruled by Congress and that "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts"). Affirming *Miranda*'s constitutional foundations substantially

commitment to the rule against adverse inferences from silence at the guilt phase of the criminal trial that was established by the Warren Court in *Griffin v. California*⁸ and even applied the rule to the sentencing stage.⁹ Only Justice Thomas urged the Court to reexamine *Griffin*.¹⁰ With the Supreme Court reaffirming *Miranda* and extending *Griffin*, at least for the present, the basic right to silence, with its warning requirements and its rule against adverse inferences, is secure throughout the criminal process from custodial interrogation through sentencing. Yet, however safe may be its core principles, the right to silence constantly is being attacked and defended, and many of its individual aspects are highly controversial. Rationales supporting the right to silence therefore remain critically important when courts and legislatures decide whether to expand or contract the right's particular guarantees that go beyond the simple right to silence warnings and the rule against adverse inferences.

strengthened its practical effect by increasing the prospect of civil penalties against those who disregard its mandates. Prior to *Dickerson*, interrogating officers often would continue questioning despite a suspect's invocation of *Miranda* rights. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 112 (1998) (presenting evidence "that police officers in some jurisdictions are systematically trained to violate *Miranda*"). California courts had condemned the practice of questioning "outside *Miranda*" but had permitted it in practice. See *People v. Peevy*, 953 P.2d 1212, 1225 (Cal. 1998) (finding admissible for impeachment a statement obtained in deliberate violation of *Miranda*, while noting that "it is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel"); *People v. Bradford*, 929 P.2d 544 (Cal. 1997) (strongly disapproving continued questioning following defendant's request for counsel, but affirming his conviction).

However, with the prospect of civil rights suits for violation of *Miranda*'s standards, California law enforcement agencies have altered their practices and police no longer engage in questioning a suspect once he states that he wishes to remain silent or to consult with counsel. See *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (establishing a clear rule that continued questioning after defendant's invocation of the right to counsel constitutes a violation of the Fifth Amendment and bars any claim of qualified immunity); *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (rejecting a claim of qualified immunity in a § 1983 action brought on behalf of a suspect who was interrogated after he had requested counsel, but who was never tried, finding police conduct to be coercive and a violation of the defendant's constitutional rights).

8. 380 U.S. 609 (1965).

9. See *Mitchell v. United States*, 526 U.S. 314 (1999) (holding that in federal court a guilty plea does not waive the privilege at the sentencing phase and reaffirming and extending the rule of *Griffin* such that the sentencing judge may not draw an adverse inference from defendant's silence in determining the facts about the crime which bear upon the severity of the sentence). While the dissenters in *Mitchell* disagreed with the majority's description of the no-adverse-inference rule as "an essential feature of our legal tradition," they acknowledged that it "may be true" that the rule has found "wide acceptance in our legal culture" which they found an "adequate reason not to overrule" it. *Id.* at 331-32 (Scalia, J., dissenting).

10. *Id.* at 341 (Thomas, J., dissenting).

B. Conventional Foundations of the Right to Silence

Defenders of the right to silence generally rely on conventional rationales articulated by the U.S. Supreme Court that involve a complex set of values such as upholding fairness, personal dignity, free will, and avoiding torture, inhumane treatment, and the cruel trilemma of self-accusation, perjury or contempt.¹¹ Of late, the Court has emphasized the deterrence of government coercion¹² and the maintenance of our adversary system of justice which prohibits the government from making a defendant the unwilling “instrument of his or her own condemnation.”¹³ The traditional view recognizes that the right to silence may help the guilty avoid conviction but concludes that it is the price which must be paid for the right’s many benefits.¹⁴ Suggestions that the right to silence also helps the innocent are more controversial. Scholar Jeremy Bentham advocated that only the guilty exercise the right while benefit from it¹⁵ and others contend that on occasion even the innocent may be helped by the opportunity to seek refuge in silence.¹⁶ The Supreme Court has remained somewhat ambivalent as

11. See *Miller v. Fenton*, 474 U.S. 104, 116 (1985) (referring to the voluntariness inquiry as having a “hybrid quality” and a “complex of values”); *Murphy v. Waterfront Com’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (referring to the privilege against self-incrimination as reflecting “our respect for the inviolability of the human personality” and “our fear that self-incriminating statements will be elicited by inhumane treatment and abuses,” and “our sense of fair play which dictates ‘a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him’”). The concern for privacy interests was mentioned in *Murphy* but has since been downplayed by the Supreme Court. See *United States v. Doe*, 465 U.S. 605 (1984) (explaining that the Fifth Amendment does not create a zone of privacy that protects an individual from the compelled production by the government of personal records); *Fisher v. United States*, 425 U.S. 391 (1976) (rejecting the contention that the Fifth Amendment somehow independently protects privacy).

12. See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (describing the purpose of the voluntariness rule as deterring future constitutional violations and preventing fundamental unfairness in the use of evidence, rather than excluding “presumptively false evidence”). The Court also held that a waiver of *Miranda* rights cannot be involuntary absent official compulsion or coercion and stated that the “sole concern” of the Fifth Amendment privilege is government coercion. *Id.* at 170.

13. *Mitchell*, 526 U.S. at 325 (citing *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

14. See *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (noting that while the “privilege may, on occasion, save a guilty man from his just deserts, . . . [i]t was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality”).

15. See JEREMY BENTHAM, *A TREATISE ON JUDICIAL EVIDENCE* 241 (M. Dumont ed., Fred B. Rothman & Co. 1981) (1825).

16. Scholars recently have sought to justify the privilege on the ground that it protects the innocent by offering them a refuge from speaking in a way that might lead to unreliable verdicts. See Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1250 (1996) (arguing that the privilege protects three types of factually innocent defendants—those who fear taking the stand because they will be impeached by their prior convictions, those whose nervousness, appearance,

to whether the privilege helps the innocent avoid conviction or otherwise leads to more reliable verdicts.¹⁷

C. *A New Twist on the Right to Silence*

Recently, other voices have offered a new twist on the right to silence which proposes an unconventional way in which the right benefits the innocent. Professors Daniel Seidmann and Alex Stein have proposed a behavioral or “game-theoretic model”¹⁸ as a foundation for an innocent-benefit theory that they contend has been largely ignored or underestimated by academics but which offers a better justification for the right than conventional rationales.¹⁹

According to Seidmann and Stein, the right to silence is justified primarily on the ground that it benefits the innocent, not because they may use it themselves, but because of its use by the guilty. Through encouraging the guilty to remain silent, the right assists factfinders in identifying those who are unjustly suspected or accused of criminal conduct. By remaining silent, the guilty separate themselves from the innocent, rather than lie and “pool” their false

or lack of mental agility might enable a prosecutor to make them appear guilty through artful cross-examination, and those whose truthful direct testimony would incriminate, despite their factual innocence); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329-31 (1991) (noting that in light of the “realities of trial practice and risks to the innocent that all lawyers understand,” trial lawyers can think of numerous reasons why they would advise an innocent client not to take the stand). See also Craig M. Bradley, *Griffin v. California: Still Viable After All These Years*, 79 MICH L. REV. 1290, 1293-94 (1981) (making similar arguments).

17. Compare *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (stating that the privilege reflects “our distrust of self-deprecatory statements and our realization that the privilege, while sometimes ‘a shelter to the guilty,’ is often ‘a protection to the innocent.’”), with *Connelly*, 479 U.S. at 170 (stating that the sole concern of both the Due Process Clause and the Fifth Amendment is to deter government coercion, rather than to assure that statements of suspects are either reliable or the product of the suspect’s free will) and *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (stating that the privilege “has little to do with a fair trial and derogates rather than improves the chances for accurate decisions”). In *Withrow v. Williams*, 507 U.S. 680, 682-83 (1993), the Court shifted back to trustworthiness as a basis for the privilege when it refused to extend the restrictions of *Stone v. Powell*, 428 U.S. 465 (1976), on federal habeas corpus review of state convictions regarding Fourth Amendment violations to *Miranda* violations, partly on the ground that *Miranda* is related to the correct ascertainment of guilt and braces against the admission of unreliable statements.

18. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 438 (2000).

19. In their support for the right to silence, Seidmann and Stein seek to drive another nail in Bentham’s coffin and to bury even deeper the suggestion of eliminating the rule against adverse inferences from silence. *Id.* at 433. They view the “conventional wisdom” that the right to silence helps only the guilty as a “facially compelling” but ultimately a flawed argument often voiced by “law and order” conservatives. *Id.* at 435, 451-55.

stories with true accounts offered by innocent suspects during pretrial interrogation and innocent defendants at trial.²⁰ Inducing this “anti-pooling effect” enhances the credibility of innocent suspects²¹ and increases the likelihood of their acquittal.²² In this way, the “good” that guilty suspects consume by remaining silent does not remain private, but is shared by innocent suspects who are not subjected to the “negative externalities” flowing from perjured accounts by the guilty.²³ To accomplish this goal, silence must be seen by the guilty as an attractive alternative to fabrication.²⁴ Thus, calls to abandon the right to silence and to permit adverse inferences from its exercise should be rejected. The innocent as well as the guilty have an interest in maintaining the right as a refuge during pretrial questioning and as a viable alternative to perjury at trial.²⁵

Seidmann and Stein believe that their “anti-pooling” rationale offers a better explanation for the present ramifications of the right to silence than conventional justifications which have been accepted and relied on by decisions of the Supreme Court.²⁶ They contend that the “anti-pooling” rationale forms the primary basis for retaining the right to silence principles that prohibit use of silence as evidence of guilt through disallowing adverse inferences from exercise of the right both during custodial interrogation and at trial.²⁷ This rationale explains why the right is limited to testimonial evidence, to the single sovereign context, to criminal cases and to the custodial interrogation and trial contexts.²⁸ Indeed, their “anti-pooling” rationale suggests that the right to silence in America might be expanded and made even more attractive to guilty suspects. On the other hand, Seidmann and Stein appear to believe that when the “anti-pooling” rationale does not apply, there is no valid reason to recognize right to silence protections against adverse inferences from its exercise.²⁹

20. *Id.* at 433, 459-60.

21. *Id.* at 433.

22. *Id.* at 451.

23. *Id.* at 457-58.

24. *Id.* at 433, 438.

25. *Id.* at 453-54 n.79.

26. *Id.* at 474-75, 489. Indeed, Seidmann and Stein agree with many of Bentham’s criticisms of the accepted justifications for the privilege such as “individualistic notion[s] of fairness” and avoidance of the cruel “trilemma” of self-accusation, contempt, or perjury. *Id.* at 452-53.

27. For example, Seidmann and Stein criticize the fairness and reliance foundations of *Doyle v. Ohio*, 426 U.S. 610 (1976), but they accept its rule that silence following *Miranda* warnings should not be the subject of adverse comment or inferences. Seidmann & Stein, *supra* note 18, at 453-54 nn.79, 491.

28. Seidmann & Stein, *supra* note 18, at 474-75.

29. Seidmann and Stein believe that if the guilty “cannot fabricate evidence in a way that harms the innocent, then they should not be exempted from potential self-incrimination,” and that “[o]nly the existence of a meaningful fabrication alternative should therefore activate the privilege.” *Id.* at 480. Nor do they believe that the innocent are in need of the right to silence protections

D. Significance of the "Anti-Pooling" Theory

Seidmann and Stein's "anti-pooling" theory represents a unique and ambitious effort to justify the right to silence on a ground that even the most ardent conservatives accept as paramount—acquittal of the innocent through accurate factfinding. But the new theory has profound implications for the right to silence. If valid, it suggests that the right should not only be maintained, but expanded to encourage even more guilty defendants to claim it.³⁰ A favorable attitude of courts and legislatures toward the right to silence may well lead to even broader protections in the context of police interrogation. For example, relying on the notion that *Miranda* established a prophylactic rule rather than a constitutional right, the Supreme Court has declined to apply the fruit of the poisonous tree doctrine to *Miranda* violations involving failure to give the required warnings³¹ and has permitted the use of statements not permitted in the prosecutor's case because of *Miranda* defects to impeach a testifying defendant.³² However, the Court's affirmation of *Miranda* as constitutionally based has cast doubt on the continued validity of these rules.³³ Furthermore, states may expand their own versions of the right to silence. Minnesota, for example, requires that confessions be recorded and imposes individual criminal and civil liability on law enforcement officers for violation of the right to consult with counsel by failing to honor a request to speak with a lawyer by any person in their custody.³⁴ Finally, the number of erroneous convictions being brought to light by newly-found DNA evidence has resulted in calls to reform interrogation practices that

which prohibit adverse inferences from failing to testify on the ground that many innocent defendants may remain silent for fear of prior conviction impeachment. *Id.* at 494.

30. Seidmann and Stein seem to favor strengthening all rules which induce an "anti-pooling" effect through making silence an "attractive alternative" to fabrications. *Id.* at 433. Currently, only a minority of suspects assert their *Miranda* rights during custodial interrogation. *See infra* note 92 and accompanying text.

31. *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) (stating that since *Miranda* sweeps more broadly than the Fifth Amendment privilege against self-incrimination and may be triggered even in the absence of a violation of the privilege, its "preventive medicine" provides a remedy even to one who has suffered no constitutional harm).

32. *Oregon v. Hass*, 420 U.S. 714 (1975) (permitting impeachment of a defendant where warnings were given, but interrogation continued after defendant asked for counsel); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that statements inadmissible in the prosecution's case-in-chief because obtained in violation of *Miranda* may, if not coerced or involuntary, be used to attack the credibility of the defendant if he takes the stand).

33. *See infra* notes 90, 217.

34. *See* Peter Erlinder, *Getting Serious About Miranda in Minnesota: Criminal and Civil Sanctions for Failure to Respond to Requests for Counsel*, 27 WM. MITCHELL L. REV. 941, 970 (2000) (noting that this responsibility can be "vindicated" by either a private consultation in the place of confinement or by telephone access to counsel in a reasonably confidential setting, but that when a person in custody requests access to counsel, the law requires consultation with counsel to be provided before questioning can continue).

are claimed to lead to false confessions.³⁵ Seidmann and Stein's theory that the right to silence helps the innocent is likely to bolster efforts to strengthen and expand the right in context of custodial interrogation.

Conversely, in attacking the conventional foundations of the right to silence and urging the acceptance of a heretofore largely unrecognized rationale as its primary basis, Seidmann and Stein are placing the right to silence in a precarious position. If the newly proposed foundation is shown to be infirm, the authors have undermined the traditional and currently accepted rationales for the right without offering any solid alternative support.³⁶

The right to silence is constantly being challenged, particularly aspects of the

35. See Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135, 1137-39 (1997) (arguing that "there is compelling and abundant evidence that false confessions occur regularly" and that those that are noticed are only the tip of the false confession iceberg); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1997) [hereinafter Ofshe & Leo, *Decision to Confess*] (contending that while the third degree has "virtually disappeared," police-induced false confessions still occur regularly and are a serious problem for the American criminal justice system). Ofshe and Leo blame deceptive interrogation techniques, such as leading the suspect to believe that the evidence against him is overwhelming and his fate is certain and that there are advantages in confessing. *Id.* at 985-86. But Professor Paul Cassell has vigorously disputed the notion that false confessions occur frequently and has criticized Leo and Ofshe for failing to consider the costs of lost convictions that might follow from restrictions on police questioning. See Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo and Alschuler*, 74 DENV. U. L. REV. 1123 (1997) [hereinafter Cassell, *Balanced Approaches*]. The debate has continued focusing on a study of what Ofshe and Leo describe as sixty cases of "police-induced false confessions in the post-Miranda era." Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 433 (1998) [hereinafter Leo & Ofshe, *Consequences of False Confessions*]. See also Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998) [hereinafter Cassell, *Protecting the Innocent*]. See also Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) [hereinafter Cassell, *Wrongful Conviction*]; Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998) [hereinafter Leo & Ofshe, *Scapegoat*]. Occasionally, there are calls to do away with interrogation entirely. See Thaman, *supra* note 2, at 620-24 (calling for eliminating interrogation of suspects as a means of investigation).

36. Seidmann and Stein deal only with the evidentiary aspect of the right to silence which prohibits adverse inferences; they accept the validity of that aspect of the right to silence which exempts a person from contempt for refusal to incriminate oneself, noting that even the most ardent critics of the right to silence do not call for removal of the contempt exemption. Seidmann & Stein, *supra* note 18, at 440 n.36.

right during custodial interrogation.³⁷ Even the rule against adverse inferences has been questioned by judges and scholars who have proposed forms of pretrial judicial examination of the accused conducted by magistrates at which defendants would be afforded counsel, but warned that silence could lead to adverse inferences at trial.³⁸ Recently, Professor Alschuler looked to Scottish procedure and suggested a judicially supervised, deposition-style examination at which the accused would remain unsworn but subject to adverse inferences for silence.³⁹ Professor Akhil Amar would even require the accused to testify under

37. For example, a request for counsel during custodial interrogation currently has a more powerful bite than a refusal to speak or answer questions. There is no per se rule against later questioning by the police following an indication of a desire to remain silent by a suspect provided officials initially cease questioning. *Michigan v. Mosley*, 423 U.S. 96 (1975). However, once a suspect requests a lawyer, there can be no further questioning until counsel has been made available to him unless he first initiates further conversations with the police. *Edwards v. Arizona*, 451 U.S. 477 (1981). This stronger medicine applies even to questioning concerning offenses wholly unrelated to the crime as to which the suspect had requested counsel. *Arizona v. Roberson*, 486 U.S. 675 (1988). While protections against further questioning after a request for counsel have been incorporated into the Sixth Amendment, they are "offense specific" in the Sixth Amendment context such that a request for counsel does not prohibit continued questioning concerning uncharged crimes. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Justice Kennedy, however, has urged the Court to bring Fifth Amendment rules into line with Sixth Amendment standards such that prohibitions on further questioning under *Miranda* are also offense-specific in the sense of not applying to crimes unrelated to those as to which the suspect had requested counsel. *Id.* at 183 (Kennedy, J., concurring). Justice Kennedy also urges the overruling of *Arizona v. Roberson*. *See id.* Furthermore, Justice Kennedy, joined by Justices Scalia and Thomas, views as "questionable" importation of the broad rule prohibiting further questioning after a request for counsel into the Sixth Amendment context where it is triggered by a request for counsel at arraignment or other judicial proceeding although defendant has agreed to be questioned without a lawyer. They find "difficult to understand" a rule that operates "to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless." *Texas v. Cobb*, 532 U.S. 162, 174-75 (2001) (Kennedy, J., concurring).

38. Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014 (1934); John H. Wigmore, *Nemo Tenetur Seipsum Proedre*, 5 HARV. L. REV. 71, 85-88 (1892). *See also* MARVIN E. FRANKEL, PARTISAN JUSTICE 98-99 (1980); WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY 71, 77-81 (1967); LLOYD WEINREB, DENIAL OF JUSTICE 163-64 (1977); Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1053 (1975); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 685, 700-01, 713-16 (1968); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 51-65 (1981); Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974).

39. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2670-71 (1996). *See also* WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE

oath by threat of contempt but with limited testimonial immunity which would not extend to fruits of such compelled testimony.⁴⁰ Consequently, however secure may be the core protections of the right to silence, the rationales supporting the right remain critically important to the future development of its many aspects. The “anti-pooling” theory therefore deserves a close inspection.

E. Analyzing Games, Markets, and “Anti-Pooling Theories

First, this Article outlines the assumptions on which Seidmann and Stein base their “Anti-Pooling” theory and describes how they use game and market models to apply and test the assumptions and draw conclusions regarding the effect of the right to silence. A troubling aspect of the “anti-pooling” theory that the authors do not discuss will also be addressed—specifically that the theory’s reliance on the rule against adverse inferences from silence, when carried to its logical conclusion, contains the seeds of its own destruction. Since the theory rests on the proposition that the no-adverse-inference rule leads to more guilty people remaining silent and factfinders believing more innocent suspects who speak, ultimately, the theory will lead to factfinders becoming more skeptical of those who refuse to speak and this will tend to undermine the very right to silence principles on which the theory rests.

Second, assuming that “anti-pooling” is a desirable goal and might be furthered by inducing the guilty to refrain from lying by remaining silent, this Article points out that, in contrast to European countries, the United States already has considerable “anti-pooling” incentives apart from the right to silence. Particularly in the trial context, the costs of speaking in America are very high. By penalizing those who speak, we induce the guilty to remain silent by using the penalty for speaking as a stick and the safety of silence as a carrot. With strong “anti-pooling” measures in the form of potent impediments to speaking already in place in American criminal trials, we may not need a powerful right to silence in order to achieve the “anti-pooling” that Seidmann and Stein believe is so important to the credibility of innocent suspects.

Next, this Article inquires into the validity of the market analogies and assumptions on which the “anti-pooling” theory rests. First, I will contend that the market analogy has little practical relevance in the real world of the American criminal trial which normally is a concentrated, one-shot process where factfinders do not accumulate market-savvy by continuous exposure to the marketplace of exonerating statements. Second, even if factfinders might gain some market experience, they have no way of testing the products they chose or reject—the exonerating statements of criminal defendants. They have no way of knowing whether the shrinking pool of suspects and defendants claiming

AND WHAT WE NEED TO DO TO REBUILD IT 68 (1999) (urging the adoption of a system involving “some formal pressure” on suspects to cooperate with the police).

40. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 56-57 (1997). For a critical analysis of Professor Amar’s proposals, see Stuart Taylor, Jr., *Rethinking the Fifth Amendment (Again)*, *LEGAL TIMES*, July 17, 1995, at 27.

innocence is due to more guilty suspects remaining silent (thus increasing the proportions of innocents in the pool of those making exonerating statements) or to other factors such as more guilty suspects confessing, more plea bargaining, or fewer innocent suspects arrested or prosecuted. Third, this Article points out that in today's real world of police interrogation the pool of exonerating statements by guilty and innocent suspects is rather large, and any incremental increase in the pool of exonerating statements that might be caused by elimination of the right to silence would not be likely to decrease the factfinder's perception of the credibility of claims of innocence.

Assuming that "anti-pooling" can affect the factfinder's evaluation of claims of innocence, the Article takes a close look at the validity of some of the assumptions of the "anti-pooling" theory in terms of the degree the innocent might be helped through the exercise of the right to silence by those who otherwise would lie. This will entail looking at both the number of innocent suspects who are in a position to be helped by "anti-pooling" and the number of guilty people who, without the right to silence, would speak in a way that would harm innocents.

First, only those innocent suspects in a position to benefit from "anti-pooling" are those who are faced with evidence of moderate strength and whose stories are unconvincing. Second, according to the "anti-pooling" theory, only the guilty who, absent the right to silence, would tell convincing stories would be in a position to spread the benefits of silence to the innocent. This category is quite limited. Only a very small proportion of guilty suspects and defendants who now claim the right to silence would tell convincing stories and confuse factfinders if the right were eliminated. In short, few guilty fabricators help the innocent by exercising their right to silence. Seidmann and Stein assume that the right to silence causes the guilty to switch from telling lies to remaining silent, but not from telling the truth to silence. They further assume that without a right to silence, suspects and defendants who would have remained silent would have no choice but to tell lies that would "pool" with the true claims of innocent suspects thereby increasing the likelihood of their conviction. However, it is likely that even with the prospect of adverse inferences from silence, many suspects would continue to remain silent, particularly career criminals and defendants in weak cases where, without a confession, the prosecution may not be able to satisfy its burden of proof. It is even less likely that the threat of adverse inferences from silence at trial would convince all defendants to take the stand because of the perils of testifying, including the prospect of aggressive cross-examination which may expose prior convictions and other highly damaging evidence. Furthermore, even if the threat of adverse inferences would convince more to speak, many would either confess or fabricate ineffectively, particularly in the context of pretrial interrogation where the guilty are less likely to be able to convincingly shape their denials as they would at trial.

To support their claim that the right to silence causes the guilty to switch from lying to remaining silent, but not from confessing to remaining silent, Seidmann and Stein dismiss evidence of a reduction in confessions following implementation of *Miranda*. Instead, they look to British studies finding that the

1994 Criminal Justice and Public Order Act (CJPOA),⁴¹ which permitted adverse inferences from silence during pretrial interrogation and at trial, caused more suspects and defendants to speak, but it did not increase the confession rate. However, it is dangerous to draw conclusions concerning alterations in particular aspects of the right to silence from foreign legal systems with very different procedural rules and professional cultures. The rule against adverse inferences cannot meaningfully be analyzed in isolation but must be considered in relation to other aspects of the silence right, as well as the procedural context in which they operate. The many differences between British and American rights and procedures suggest that limiting the right to silence in America may well have different consequences than it will across the ocean. In sum, in light of the small number of innocent suspects who are in a position to be helped by “anti-pooling” and the limited number of guilty people who, without the right to silence, would speak in ways that would harm the innocent, any benefit to the innocent from the “anti-pooling” effect of the guilty choosing to speak rather than to remain silent most likely is marginal at best.

Next, I will inquire into the costs of the right to silence stemming from the fewer guilty suspects that speak to the police or to juries. Seidmann and Stein acknowledge that the right to silence reduces the conviction rate and results in the acquittal of some guilty defendants.⁴² However, they claim that drawing meaningful conclusions from a cost-benefit analysis is difficult when it is not known how many innocent suspects may be jailed without the silence right or how many guilty are now freed on account of it. They conclude that the “requisite cost-benefit calculation” is beyond the scope of their study.⁴³ Nevertheless, they suggest that the social benefits from fewer wrongful convictions strongly outweigh the social costs do more wrongful acquittals.⁴⁴ While the authors recognize that “anti-pooling” also might be brought about by increasing incentives to tell the truth and confess,⁴⁵ they assert that a “much cheaper” and more preferable way to “purge the lemons” is to pay potential producers of false statements to remain silent by giving them the right to do so “without sustaining punishment or adverse inference.”⁴⁶ However, a meaningful

41. Criminal Justice and Public Order Act, 1994, c. 33, §§ 34-39 (Eng.) [hereinafter CJPOA].

42. See Seidmann & Stein, *supra* note 18, at 499-500. Seidmann and Stein state that “the right to silence reduces convictions of both innocent and guilty defendants.” *Id.* at 473.

43. *Id.*

44. *Id.* 473-74. Seidmann and Stein contend that the prevention of wrongful convictions is an “immensely greater value to society than prevention of wrongful acquittals,” hence retention of the silence right would be “the socially optimal choice.” *Id.* at 494.

45. Seidmann and Stein recognize that “the desired separation” also could be achieved by inducing more guilty suspects to confess rather than lie through such measures as more prosecutions for perjury and paying for true statements by plea bargaining, but they dismiss such prospects on the ground that they “generally incur greater social costs than do incentives for silence.” *Id.* at 434, 460-61.

46. *Id.* at 461.

analysis of the practical consequences of the right to silence requires some attempt to assess its costs both in the form of lost convictions of the guilty and diminished help for the innocent who benefit from guilty suspects either confessing or making false but refutable (and ultimately incriminating) statements.⁴⁷ Since the amount of assistance that silence by the guilty provides to the innocent through "anti-pooling" is marginal at best, the right to silence may overprotect in a way that helps many guilty, but very few innocents, avoid conviction.

Finally, I will look at implications of the "anti-pooling" theory that suggest that the right to silence is such a good thing for the innocent that it should be enlarged to better protect them. I will argue that expanding the right to silence by adoption of rules that induce more suspects to request counsel at interrogation, limit deception, or require disclosure of prosecution evidence prior to questioning, would deter some criminals from confessing and assist others in fabricating effectively. By doing so, it would undermine the goal of truth discovery, particularly in marginal cases where police may have strong suspicions but not enough evidence to persuade a jury beyond a reasonable doubt, that is, in the very cases in which confessions are most needed to convict the guilty.⁴⁸ Consequently, Seidmann and Stein's analysis suggests good reasons to be skeptical of proposals that would expand the right to silence in the pretrial context, particularly those that would formalize the interrogation process by means of lawyers armed with knowledge of police evidence and sworn to use all legal means to prevent the prosecution from proving its case beyond a reasonable doubt.

However, Seidmann and Stein's "anti-pooling" analysis is helpful in focusing attention on the harm caused by convincing lies, which can frustrate accurate factfinding in more important ways than their general "pooling" effect in the marketplace of exonerating statements. False statements claiming innocence, which are plausible and not subject to effective contradiction, may not only lead to the release of the guilty, but may also contribute to the arrest and conviction of the innocent by "specific pooling" (the creation of case-specific factual conflicts). This is more directly detrimental to accuracy than the diminished credence given to statements of the innocent from the mere fact that a few more guilty people lie. Furthermore the "anti-pooling" theory is helpful in emphasizing the importance of unrehearsed statements, particularly the defendant's story prior to an opportunity to contrive a response to prosecution evidence. Yet liberal admissibility of such statements should be a two-way street in which defendants' early claims of innocence can be offered by the defense, as well as by the prosecution.

In sum, Seidmann and Stein's "anti-pooling" analysis shows that lies come

47. False statements help the innocent in that the police will likely investigate these statements, learn of their falsity, and allow the prosecutor to use them as impeachment during trial.

48. Seidmann & Stein, *supra* note 18, at 461. Furthermore, according to Seidmann and Stein's "anti-pooling" theory, in weak or marginal cases the exercise of the right to silence does not benefit the innocent but merely helps the guilty avoid conviction.

in various forms and that the need to distinguish between them is important. Convincing falsehoods can be highly beneficial for the guilty but highly harmful to the innocent, and rebuttable and ultimately incriminating falsehoods can be as important to accurate factfinding as confessions. Thus, leaving in place the rules against adverse inferences and *Miranda*'s basic right to silence warning, we should shape the right to silence and associated guarantees applicable to police interrogation with a focus on permitting procedures that tend to induce guilty suspects to tell the truth, and avoiding procedures that give them the opportunities and tools that would further the creation of uncontradictable fabrications. Such reforms would offer fewer benefits to the guilty than would an expanded right to silence, while protecting the innocent in more significant ways than merely reducing the number of lies in the marketplace of exonerating statements.

I. ASSUMPTIONS AND IMPLICATIONS OF THE "ANTI-POOLING" THEORY

A. Assumptions of the "Anti-Pooling" Theory and Use of Market Models

Seidmann and Stein's "anti-pooling" model is based on a number of assumptions. First, innocent suspects almost invariably will speak and assert their innocence both during pretrial interrogation and at trial.⁴⁹ Second, the fate of innocent suspects often depends on the credibility of their true stories. Next, in their efforts to appear innocent, guilty suspects "pool" their false stories with true accounts offered by innocent suspects and harm the innocent by diminishing the credibility of their stories.⁵⁰ In this way, when guilty suspects perjure themselves, they "impose negative externalities" on innocent suspects.⁵¹ However, virtually all suspects seek to be released and exonerated and generally

49. *Id.* at 433. While Seidmann and Stein recognize that the innocent may exercise the right to silence in exceptional cases, *id.* at 464, they accept Bentham's claim that innocent suspects rarely exercise the right to silence. *Id.* at 436, 455 n.82 (putting aside exceptional cases and noting that "[t]he existence of silent innocents does not enter into our model"). The innocent suspect's choice to speak is rational since "an innocent suspect is . . . at least as well off telling the truth as exercising the right to silence." *Id.* at 466. Contrast the Supreme Court's observations in *Mitchell v. United States*, 526 U.S. 314, 329 (1999) that the rule against adverse inferences from silence "is of proven utility." The Court in *Ullmann v. United States*, 350 U.S. 422, 426 (1956), noted that people "too readily assume that those who invoke [the privilege] are either guilty of crime or commit perjury in claiming the privilege." Later the Court quoted Wigmore's observation that "the layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978). But times have changed: "It is far from clear that citizens, and jurors, remain today so skeptical of the principle or are often willing to ignore the prohibition against adverse inferences from silence." *Mitchell*, 526 U.S. at 330.

50. Seidmann & Stein, *supra* note 18, at 433, 457-58.

51. *Id.* at 442-43, 458.

will act rationally in pursuit of this objective.⁵² Additionally, although the guilty “typically” will choose to speak rather than to exercise the right to remain silent, and despite that “silence is usually the better choice,”⁵³ in their rational pursuit of exoneration, the guilty will refrain from “pooling” by exercising the right to silence if it appears in their interest to remain silent rather than to lie.⁵⁴ When silence is not penalized by adverse inferences of guilt, it appears as an attractive alternative to fabrication, and guilty suspects will perceive (correctly in most cases) that they are better off remaining silent than speaking.⁵⁵ Further, when the guilty “rationally exercise” the right to silence to reduce the risk of their own conviction, they also reduce the risk that innocent suspects will be wrongfully convicted.⁵⁶ Thus, by refraining from “perjuriously pooling with innocents,” the guilty “minimize[s] the risk” of wrongful conviction of the innocent.⁵⁷ Finally, in light of the considerable benefits flowing to the innocent from the exercise of the right to silence by the guilty, retaining the silence right is a cheap price to pay the guilty for withholding their fabrications and increasing the prospect that innocent defendants will be acquitted.⁵⁸

In essence, Seidmann and Stein view the right to silence and its embodiment in the privilege against self-incrimination as a means of helping the innocent in their struggle to make themselves believed. Their “anti-pooling” theory posits that the right to silence induces the guilty to choose silence over fabrication, which results in fewer false statements compared with true ones, which causes factfinders to be more accepting of the statements of innocent suspects and leads to a greater likelihood of their acquittal.

Seidmann and Stein apply and test the foregoing assumptions in theoretical laboratories of markets and games. In these “game-theoretic” models, participants in the justice system exercise rational choices based on their own welfare and on their perception of the choices others in the system would make given the particular rules of the game or marketplace.⁵⁹ The process of criminal

52. See *id.* at 442, 448. However, Seidmann and Stein acknowledge that the guilty often do not act rationally since they generally speak when it would be in their best interest to remain silent. Under “stressful interrogation” and with “asymmetric information,” “guilty suspects often choose the worst possible move, which brings about the worst possible outcome.” *Id.* at 464.

53. *Id.* at 448. Seidmann and Stein nonetheless concede that silence does have its price. At the pretrial stage, silence is “tantamount to admitting guilt and challenging the police to obtain evidence that will convict,” and at trial the damage from silence is even more serious. *Id.* at 446-47.

54. *Id.* at 448. However, the fact that most guilty suspects speak to police while total silence usually is their best choice seems inconsistent with the assumption of the game-theoretic model that “each player’s strategy is that player’s best move in light of the strategies actually chosen by the other players.” *Id.* at 465-66.

55. *Id.* at 465 (noting that experienced suspects and those receiving legal advice are more likely to exercise their silence right).

56. *Id.* at 499.

57. *Id.* at 457-58.

58. *Id.* at 473, 494.

59. *Id.* at 433-34. Seidmann and Stein describe their game-theoretic method, otherwise

investigation and trial is seen as a market for self-exonerating stories in which suspects and defendants seek to sell their accounts to factfinders—police and prosecutors at the pretrial stage and the jury at trial.⁶⁰ Since the innocent must compete with the guilty in this enterprise, measures should be adopted that “drive false statements out of the market.”⁶¹

According to Seidmann and Stein’s used car market analogy,⁶² with lemon-sellers (guilty fabricators) and apple-sellers⁶³ providing the same stories about their cars, buyers (factfinders) are confused and may disbelieve apple-sellers, thereby convicting innocent defendants. But if lemon-sellers do not make claims of good quality, their false statements will not be pooled with the true claims of apple-sellers. Buyers then will give greater credence to valid claims of good quality thereby increasing the chance that they will buy them (acquit apple-sellers).⁶⁴

*B. The Adverse Inference Problem: The “Anti-Pooling” Model
as Both Resting on and Undermining the Right to Silence*

Seidmann and Stein concede that the right to silence in the form of a prohibition on adverse inferences from silence, along with aiding the innocent in avoiding unjust convictions, to some extent helps the guilty to escape conviction. But in order to help the innocent in the manner suggested by the theory, must the right to silence necessarily also hurt the guilty in a way that undermines the very basis of the right?

Consider a society in which all innocent suspects asserted their claims of innocence and all guilty remained silent. If factfinders became aware of this phenomenon, they would believe all exonerating statements. According to Seidmann and Stein’s model, as a society moves in this direction and as fewer

known as the Bayesian Nash Equilibrium Tool, as focusing on a person’s rational choice in a strategic situation in which that person’s welfare or best choice depends on his or her perception about the choices that others in the game will make, and explores the effects of altering the rules of the situation (the game) on all participants. *Id.* at 441, 465. The theory assumes that the belief of all players, including the suspect and the factfinder, as to how others will respond are correct such that “each player’s strategy is that player’s best move in light of the strategies actually chosen by the other players.” *Id.* at 465-66.

60. *Id.* at 460.

61. *Id.*

62. *Id.* at 459.

63. For the purposes of this Article, apple-sellers are innocent suspects who tell the truth to factfinders. Seidmann and Stein did not use this term in their article.

64. According to Seidmann and Stein, with no anti-pooling protections, buyers of used cars will pay no more than average value and quality car owners will take their cars off the market, eventually creating a single “market for lemons.” *Id.* at 459. But innocent suspects cannot readily opt out of the market and go home. They are undergoing custodial interrogation or on trial. They must try to sell their cars, and it is unreasonable to assume that they will not convey their cars’ attributes to prospective sellers merely because owners of lemons will lie about their cars. *Id.*

guilty suspects try to lie their way out of accusations, factfinders will give greater credence to the accounts of innocent suspects. Increasing the proportion of guilty persons who refuse to speak will increase the likelihood that the factfinder will accept the accounts of the innocent (who virtually always speak and are assumed to speak the truth) and will convict them less often. In fact, the authors visualize a perfect "right-to-silence regime" in which "neither pooling nor the ensuing wrongful convictions materialize" for the reason that "innocents still tell the truth, whereas guilty suspects separate themselves by rationally exercising the right."⁶⁵ In this ideal world, where measures have been adopted which "drive false statements out of the market,"⁶⁶ the guilty will separate themselves from the innocent by remaining silent, and the jury will draw "a favorable inference from any exculpatory statement, and innocent suspects (who alone make such statements) are thus acquitted."⁶⁷

But does this model also depend on factfinders being more skeptical of those who assert their right to silence and refuse to speak, with police and prosecutors less inclined to release them during the pretrial stage and juries more inclined to convict them at trial?⁶⁸ If so, the model depends on factfinders being more inclined to employ adverse inferences from silence at the same time that it relies on a broad right to silence unencumbered by adverse inferences as a safe harbor for the guilty who otherwise would lie and confuse things.

It might be argued that with guilty suspects remaining silent more frequently, factfinders would give more weight to innocent accounts while not changing their attitude toward those who claim the right to silence, thus avoiding any adverse inferences. But the used car analogy and notions of human behavior point in the opposite direction. With fewer lemon-sellers falsely touting their cars and buyers placing greater credence in the true claims of apple-sellers, buyers naturally would be more skeptical of car sellers who remained silent and refused to provide any information regarding the history or condition of their cars. In a society in which only innocent suspects claimed innocence and all guilty suspects remained silent, factfinders would believe all exonerating statements, and convict all silent defendants. As a justice system moves in this direction and as fewer guilty suspects claim innocence, the model posits that factfinders will tend to believe more innocent accounts, or as Seidmann and Stein put it, will be more hesitant to "rationally discount the probative value of uncorroborated exculpatory statements."⁶⁹ But if so, factfinders naturally would be more skeptical of those who failed to speak and assert their innocence and more readily assume guilt from silence.

In short, the authors' model suggests that the more often guilty suspects exercise their right to silence, the more it hurts them by weakening the rule

65. *Id.* at 503.

66. *Id.* at 460.

67. *Id.* at 469.

68. *Id.* Seidmann and Stein suggest that remaining silent during pretrial questioning will cause the authorities to concentrate their efforts on guilty suspects. *Id.* at 447.

69. *Id.* at 503.

against adverse inferences from silence.⁷⁰ The model, which is founded on a robust right to silence in the form of a prohibition on adverse inferences from its exercise, naturally creates its own counter pressures which bring about a greater likelihood of adverse inferences from silence, thus undercutting its own foundations. The more efficiently the model operates and the more guilty people choose silence over fabrication, the more precarious the right to silence becomes. Furthermore, once the guilty become aware of the increased credibility given to claims of innocence, they would tend to prefer lying over silence. This “free-rider” tendency would then undercut the central assumption of the “anti-pooling” theory—that if fewer guilty speak, the remaining speakers will be seen as more credible.⁷¹ With the “anti-pooling” model containing the seeds of its own destruction and eventually collapsing of its own weight, things would tend to even out in the end.⁷²

C. *“Anti-Pooling” by Using the Stick Rather than the Carrot*

Assuming that “anti-pooling” is a desirable goal and that it might be furthered by inducing the guilty to refrain from lying by remaining silent, similar results might be achieved by making the defendant an offer he cannot refuse. Instead of inducing the guilty to remain silent by utilizing the right to silence carrot, which involves maintaining an attractive safe harbor in silence, one might

70. Of course, a trend toward more guilty suspects choosing silence over fabrications that has the practical effect of weakening the prohibitions on using silence to infer guilt may result in more accurate factfinding. *Id.* The authors agree that in the real world, silence in the face of criminal accusations is highly probative evidence of guilt since innocent suspects virtually always proclaim their innocence. Certainly, silence has much more than some “tendency to make the existence of any fact that is of consequence . . . more probable . . . than . . . without the evidence.” FED. R. EVID. 401. Provided factfinders are aware of the fact of silence and its significance, the practical effect of rules prohibiting adverse inferences may be weakened such that the cost of the right to silence in terms of more acquittals of guilty suspects might be significantly reduced. However, if “anti-pooling” increases the significance of silence in the eyes of the jury, making them more skeptical of those who choose it, one might contend that, without a change in present rules of evidence, the shift would result in the danger of convicting more innocent defendants who choose to remain silent to avoid impeachment with prior convictions or the chance of appearing unconvincing under vigorous cross-examination in the formal trial context.

71. I owe this “free-rider” insight to my colleague Professor Rory Little.

72. Much would depend on such factors as the extent to which the guilty exercise the right, whether factfinders are aware that claims of innocence are becoming more credible from the fact that fewer guilty people make such claims, and whether factfinders nevertheless are following judicial instructions against inferring guilt from refusals to speak or to testify. In light of these considerations, it seems that the weakening of the no-adverse-inference rule is more likely to occur with respect to trial silence as opposed to pretrial silence, since generally the ultimate factfinder—the jury—is unaware of whether the defendant during custodial interrogation proclaimed his innocence or remained silent, whereas his refusal to testify at trial is an evident fact of which the jury is always aware, although legally forbidden to consider.

seek to increase the possible harm from speaking as a stick to persuade the guilty to keep their lies to themselves. Instead of making silence safer, speaking could be made more dangerous. In fact, we are now taking both approaches with an emphasis on punishing those who choose to speak. While we view the opportunity to speak and to testify in court as a fundamental right of the accused, our present system penalizes speaking both pretrial and at trial—and the perils of talking are increasing.

In the pretrial context, speaking to the police or to prosecutors clearly is very dangerous. While there are some small benefits in confessing at an early stage of an investigation,⁷³ these benefits are greatly overshadowed in most cases by the damage such statements cause during plea bargaining and at trial. Even exonerating statements usually work against most defendants who eventually must choose to either accept a plea bargain or go to trial since evidence rules permit the prosecutor to use them freely, but generally prohibit their use by the defendant to bolster his claim of innocence. Ordinarily, such statements are inadmissible hearsay when offered by an accused.⁷⁴ In contrast to lawyers in

73. In federal cases, a defendant may receive a three-level reduction in sentence for acceptance of responsibility in a timely manner. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2001) [hereinafter U.S.S.G.]; *United States v. Corona-Garcia*, 210 F.3d 973, 980-81 (9th Cir. 2000).

74. Only in unusual cases are defendants able to introduce their exonerating stories at trial. For example, prior statements of an accused generally are not admissible as consistent statements under FED. R. EVID. 801(d)(1)(B). See *United States v. Nelson*, 735 F.2d 1070 (8th Cir. 1984) (defendant's prior exculpatory statement was not admissible as a consistent statement under rule 801(d)(1)(B)). Such statement may be admissible to rehabilitate a defendant only if defendant testifies and is impeached by an allegation of an improper motive and the statement was made before the improper influence or motive was alleged to have arisen. See *Tome v. United States*, 513 U.S. 150 (1995). Nor are post-arrest statements by a defendant asserting innocence admissible under the state of mind exception. See *United States v. Carter*, 910 F.2d 1524 (7th Cir. 1990) (defendant's prior exculpatory statement was not admissible under the state of mind exception of 803(3) since it referred to a past, rather than to a then-existing, state of mind); *United States v. Rodriguez-Pando*, 841 F.2d 1014 (10th Cir. 1988) (tape recording of defendant's statement to police the day following his arrest in which defendant claimed that he had been coerced to act as he did was inadmissible on the ground it was a statement of memory of past events and beliefs).

A limited avenue of admissibility is available if a defendant raises a mental defense, calls an expert witness, and seeks to elicit the statement as one of the bases for the expert's opinion. FED. R. EVID. 703 provides that if the facts or data upon which an expert bases an opinion or inference are of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. However, the rule was amended, effective December 2000, to limit the admission of facts which form the basis for expert opinion when offered by the party calling the expert. Under the new rule, facts that are otherwise inadmissible "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." FED. R. EVID. 703.

European countries who often will advise suspects to be cooperative and truthful, American defense lawyers virtually always advise suspects not to talk to police.⁷⁵ For example, when O.J. Simpson appeared with his lawyer at a bail hearing and attempted to explain why he had fled in the Bronco, his lawyer advised him to remain silent. However, he kept talking. Finally his lawyer warned Simpson, "I will not allow you to speak and I will resign as your lawyer if you continue to do so."⁷⁶ Virtually all criminal defense attorneys would view such advice as sound, indeed vital, under the circumstances.

Of course, another reason why pretrial silence is attractive in America is that it provides a safe harbor for the guilty. The right to silence caution has some effect, but the real bite comes from associated rules and practices, such as the strict cut-off rules which require terminating interrogation whenever a suspect declines to speak or requests a lawyer. While *Miranda* and its progeny do not require the presence of stationhouse lawyers⁷⁷ or even give defendants the right on request to see a lawyer unless interrogated,⁷⁸ the *Miranda-Edwards* rules require terminating interrogation whenever a suspect declines to speak or requests a lawyer.⁷⁹ Such rules contrast sharply with the continental and English

75. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). Justice Jackson's well known observation over forty years ago still states the accepted wisdom of criminal defense lawyers in this country: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Id.*

76. Before represented by counsel, Simpson had gone to police headquarters voluntarily, submitted to questioning for thirty-two minutes, gave a blood sample and returned home. Arenella, *supra* note 16, at 1237. Arenella characterized the police questioning as "polite" and asks why the detectives did not engage in more prolonged and tougher interrogation since he had waived his right to silence and to counsel. While regarding this as "one of the mysteries of the case," Arenella asks whether detectives would have adopted the same polite and deferential style of questioning if they were dealing "with a more typical suspect." *Id.* at 1237 n.8.

77. See *Davis v. United States*, 512 U.S. 452, 460 (1994) (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (noting that *Miranda* rejected the notion "that each police station must have a 'station house lawyer' present at all times to advise prisoners")).

78. See *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that *Miranda* does not require that lawyers be producible on call, but only that a suspect be informed that he has the right to counsel before and during questioning and that counsel would be appointed for him if he could not afford one). Thus, "[i]f police cannot provide appointed counsel, *Miranda* requires only that police not question a suspect . . ." *Id.* at 204. See also *Moran v. Burbine*, 475 U.S. 412 (1986) (finding that *Miranda* had been waived despite fact that defendant had not been informed that counsel purporting to represent him had called police and requested that no questioning take place and that police had assured counsel that defendant would not be questioned).

79. *Miranda*, 384 U.S. at 436. See also *Minnick v. Mississippi*, 498 U.S. 146 (1990) (holding that *Edwards'* protection does not cease once suspect has consulted with his attorney, such that once defendant has requested an attorney, interrogation must cease and police may not re-initiate questioning without an attorney present even though defendant has consulted with his attorney); *Arizona v. Roberson*, 486 U.S. 675 (1988) (holding that once a suspect cuts off custodial interrogation by invoking his right to counsel, he may not, as long as he remains in custody, be

approaches which allow continued questioning in the face of a suspect's refusal to speak.⁸⁰

In the trial context, the dangers from testifying are considerable and they are on the rise. America's super-adversary trial procedure shields a defendant from inquiry by focusing the trial on the lawyers rather than on the accused who often appears set apart from the trial process.⁸¹ But a defendant who dares take the witness stand will face cross-examination by an aggressive prosecutor as well as the possibility of performing poorly before the body that will determine his fate. Most important, our rules of evidence operate to strongly discourage the defendant from taking the stand by saying to him,

If you testify, the jury will become aware of your felonious history, you may be prosecuted for perjury or your sentence enhanced if you lie, and you will be cross-examined by an aggressive prosecutor;⁸² but if you

questioned by the original interrogators or others about an offense wholly unrelated to the crime as to which he has already requested counsel, unless counsel has been provided him or the suspect himself initiates further communications with officials); *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)) (characterizing *Edwards* as a "ridged prophylactic rule" which embodies two distinct inquiries: whether defendant actually invoked his right to counsel and if he did, the court may admit responses to further questioning only if defendant both initiated further discussions with the police and knowingly and intelligently waived the right he had invoked); *Edwards v. Arizona*, 451 U.S. 477 (1981) (announcing a stricter rule when defendant requests a lawyer: That once a suspect has asserted his right to counsel under *Miranda*, there can be no further interrogation until counsel has been made available to him unless defendant himself initiates further conversations with the police); *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (describing a person's "right to cut off questioning" as a "critical safeguard" and stating that *Miranda* requires a "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored").

Although voluntary statements obtained in violation of these rules can be used to impeach, courts are beginning to permit civil actions against police for "going beyond *Miranda*" and continuing to ask questions after a suspect has asked for a lawyer. See *Cooper v. Dupnick*, 963 F.2d 1220 (9th Cir. 1992); see also *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (establishing clear rule that continued interrogation after defendant's invocation of the right to counsel constituted a clear violation of the Fifth Amendment giving rise to civil liability in which qualified immunity is unavailable).

80. See Van Kessel, *supra* note 2, at 819-21.

81. Compared to European trials, for example, courtroom arrangement and choreography greatly limit exposure of the accused. American defense lawyers generally sit beside the accused, often between him and the jury, whereas in continental trials, lawyers usually sit in back of the accused and are restricted in prompting his responses. In England, the accused (who is placed in a dock at the center-rear of the courtroom) is even more separated from his barrister who sits in the front benches some distance away. For a description of the numerous incentives to speak at a French criminal trial which starkly contrasts with American practices, see Lerner, *supra* note 4.

82. The threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand. A study of American jury trials found that a defendant was almost three times more

remain silent, neither your past nor your present silence will be mentioned by the judge or prosecutor, and if you wish, the jury will be cautioned against drawing adverse inferences.⁸³

Furthermore, once the accused takes the witness stand, he is open to impeachment by many types of evidence previously found to be illegally obtained and inadmissible, such as fruits of illegal searches or seizures and statements obtained in violation of *Miranda*.⁸⁴ The threat of admissibility of evidence and prior bad acts also can keep a defendant from the witness stand. In the recent highly-publicized "road rage" case in which a driver was charged with reaching into the car of another driver and throwing her fluffy, white dog into oncoming traffic, the judge ruled that if the defendant testified that the dog had bitten him first, the prosecutor could call a witness to testify that he had seen the defendant beat a disabled dog to death. The defendant did not take the stand and

likely to refuse to testify if he had a criminal record than if not. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 146 (1966).

83. The legal prohibition on adverse inferences precludes any reference to defendant's failure to testify. See *Carter v. Kentucky*, 450 U.S. 288 (1981) (holding that on defendant's request, the jury was to be instructed that silence must be disregarded); *Griffin v. California*, 380 U.S. 609, 614 (1965) (prohibiting both judicial instructions and prosecutorial comment which suggested that defendant's silence at trial could be used as evidence of guilt); *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978) (disallowing prosecutorial argument that certain evidence was "uncontradicted" when contradiction would have required defendant to take the stand and would draw attention to his failure to do so).

There appears to be a trend toward greater acceptance of the right to silence by both the courts and the American public, which suggests that juries may be taking it more seriously. Until recently, the common perception has been that the right to silence at trial is rather anemic and generally of little consequence. Jurors, and even judges, have ordinarily expected the defendant to give evidence and have held it against the defendant if he does not take the stand. However, due to recent extensive media coverage of high profile trials, the public is being exposed to situations in which the defendant does not make pre-trial statements or testify at trial. When neither the judge nor the lawyers ask why the accused fails to talk, the public slowly becomes accustomed to a system in which the accused is a silent and passive observer of the courtroom action. In recent years, both the legal profession and the public have become more accustomed to criminal trials in which the defendant remains silent while his lawyers attack the prosecution's case, and they have become more comfortable with the notion that the accused is not expected to personally provide his version of the events. This changing perception was recognized recently by the Supreme Court. See *supra* note 49.

84. See *Michigan v. Harvey*, 494 U.S. 344 (1990); *United States v. Havens*, 446 U.S. 620 (1980); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). Furthermore, defendant's silence, whether before or after arrest, can be used to impeach his testimony as long as it was not in response to *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980). However, the prosecutor cannot use illegally obtained evidence to impeach the credibility of defense witnesses other than the defendant. *James v. Illinois*, 493 U.S. 307 (1990).

the witness never testified.⁸⁵

The impediments to testifying are increasing. In some jurisdictions, the danger of impeachment by prior convictions has become more serious,⁸⁶ and the Supreme Court recently limited the ability of defendants to lessen the impact of such impeachment.⁸⁷ The Court upheld a rule penalizing a testifying defendant who attempts to "remove the sting" of prior conviction impeachment by bringing out the fact of the conviction on direct examination.⁸⁸ By doing so, defendant waived the right to appeal the judge's adverse *in limine* ruling allowing such impeachment.⁸⁹ Finally, the Court recently permitted the prosecutor to comment to the jury regarding defendant's presence at trial that allowed him to tailor his testimony to fit the evidence which had been presented.⁹⁰

D. *The Consequences of Sticks and Carrots*

What are the results of the present system which penalizes speaking and provides a safe harbor for silence both pretrial and at trial? To support their claim that the right to silence "cannot be responsible for many erroneous acquittals," Seidmann and Stein assert that "suspects do not exercise the right to silence very often either at interrogation or at trial."⁹¹ But this does not appear to reflect the current situation in America where a substantial number of suspects assert their *Miranda* rights by refusing to answer police inquiries and an even

85. Evelyn Nieves, *Driver Who Tossed Dog is Convicted of Cruelty*, N.Y. TIMES, June 20, 2001, at A12. The case was tried in San Jose, California, and the defendant was convicted. *Id.*

86. In California, for example, prior to 1982 the courts had restricted the prosecutor's impeachment of a defendant with previous convictions. However, an initiative entitled the "Victim's Bill of Rights" added Section 28(f) to Article I of the California Constitution and provided that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." *People v. Collins*, 722 P.2d 173, 175 n.1 (Cal. 1986) (quoting CAL. CONST. art. 1, § 2816); *People v. Castro*, 696 P.2d 111 (Cal. 1985). Another provision of the 1982 initiative permitting admission of all relevant evidence (with some exceptions) now permits impeachment with prior conduct which did not result in a conviction. *See People v. Wheeler*, 841 P.2d 938, 943 (Cal. 1992) (holding that the new rule gives trial courts broad discretion to admit or exclude all acts of dishonesty or moral turpitude relevant to impeachment).

87. *Ohler v. United States*, 529 U.S. 753, 760 (2000).

88. *Id.* at 758.

89. *Id.* (holding that if, following a judge's *in limine* ruling permitting impeachment use of defendant's prior convictions, defendant preemptively testifies to those convictions on direct examination, defendant thereby waives the right to challenge the judge's ruling on appeal).

90. *See Portuondo v. Agard*, 529 U.S. 61, 65-76 (2000) (holding that the prosecutor's comments in her summation calling the jury's attention to the fact that defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly did not violate defendant's Sixth Amendment right to be present at trial, his Sixth Amendment right to confront witnesses, or his Fifth and Sixth Amendment right to testify in his own behalf).

91. Seidmann & Stein, *supra* note 18, at 448.

larger proportion of defendants refuse to testify at trial.

While most suspects waive their *Miranda* rights and make statements, a substantial number do not. The proportion of American suspects who assert their right to silence and refuse to answer questions varies considerably but averages around twenty percent.⁹² The frequency of damaging statements also varies, but most studies have found that confession rates declined following *Miranda* and that in the post-*Miranda* era, confessions are found in less than one-half of the cases.⁹³ A study of thirty-seven capital jury trials in California from 1988 to

92. In my 1986 review of American studies, I found that the proportion of suspects who remained silent varied from five percent to sixty percent. See Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 116-19 (1986). Professor Cassell's more extensive review of American studies found that the percentages of those invoking *Miranda* vary widely (from seventy-seven percent to four percent) averaging about twenty percent. Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 495 (1996). Other recent studies have come to similar conclusions. In a study of police interrogation practices at three police departments in Northern California during 1992 and 1993, Professor Richard Leo found that twenty-one percent of the suspects (thirty-eight out of 182) invoked their *Miranda* rights. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268, 275-76 (1996). Cassell's 1994 Salt Lake County study found that 16.3% of suspects given *Miranda* invoked their rights initially. Cassell, *supra*, at 496.

93. In my 1986 review of English and American confession rates, I noted that American studies conducted after *Miranda* became common knowledge detected an increase in refusals to answer questions and "some decline in confession rates." Van Kessel, *supra* note 92, at 128. Professor Paul Cassell's later, more extensive reviews of American studies and his 1994 Salt Lake County study also found declining confession rates following *Miranda*. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084, 1091-92 (1996) (concluding that studies before *Miranda* found that defendants made damaging statements in well over fifty percent of the cases, while after *Miranda* the rates dropped considerably such that the rates now vary from twenty percent to fifty percent); Cassell, *supra* note 92, at 483 (finding a sixteen percent nationwide drop in confession rates following *Miranda* when confessions were necessary for conviction in twenty-four percent of the cases, resulting in a 3.8% loss of convictions in serious cases (.16 x .24)); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 842 (1996) (summarizing their Salt Lake County study and finding a confession rate of thirty-three percent suggesting that "*Miranda* has reduced the confession rate"). But see Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 545 (1996) (disputing Cassell's calculations and concluding that with the "necessary adjustments" the confession rate change drops from sixteen percent to 4.1% and the harm to law enforcement due to lost cases declines to "at most 0.78%"). Cassell responded to Schulhofer, contending that studies before *Miranda* found that defendants made damaging statements in well over fifty percent of the cases, while after *Miranda* the rates dropped considerably such that the rates now vary from twenty percent to fifty percent. Cassell, *supra*, at 1091-92. But see George C. Thomas, III, *Law's Social Consequences*, 51 RUTGERS L. REV. 845, 852 n.36 (1999) (reading Cassell's studies as showing a more than fifty percent chance that interrogation will lead to incriminating statements).

1992 found that defendants made pretrial confessions in only twelve of the cases (thirty-two percent).⁹⁴ This post-*Miranda* decline is not surprising since the right to silence has become a familiar feature on the legal landscape. Moreover, those with felony conviction records, who are more likely to refuse to make statements,⁹⁵ are becoming more aware of the consequences of waiving their *Miranda* rights.

As to exercising the right to silence at trial, with increasing frequency defendants are not taking the stand at trial as they once did. In colonial America, virtually all defendants testified at trial, and this trend continued throughout the first half of this century. Studies of trials in the 1920s and the 1950s show that very few defendants refused to testify at trial and that few were helped by such refusals.⁹⁶ However, following *Griffin* and the Supreme Court's decisions of the 1960s and 1970s which strengthened the right to silence, fewer and fewer defendants are testifying at trial. Professor Schulhofer's study of Philadelphia

In a multiple regression analysis of FBI data, Cassell and Fowles found that national crime clearance rates fell precipitously in the two years immediately following *Miranda* and have remained at lower levels ever since and concluded that "*Miranda* has seriously harmed society by hampering the ability of the police to solve crimes." Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1132 (1998) [hereinafter Cassell & Fowles, *Handcuffing the Cops?*]. John J. Donohue used his own regression model with Cassell and Fowles' data and found a statistically significant post-1966 effect only for total violent crime and for the individual crime of larceny and could neither substantiate nor reject the claims of Cassell and Fowles. John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1172 (1998). In response, Cassell and Fowles then contended that Donohue's figures largely supported their conclusions that crime rates fell substantially after *Miranda* and that *Miranda* was in large part a cause of this decline. Paul G. Cassell & Richard Fowles, *Falling Clearance Rates after Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) [hereinafter Cassell & Fowles, *Falling Clearance Rates*].

94. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1584-1585, tbl. 8 (1998). Only five of the twelve voluntarily turned themselves in or were arrested on unrelated charges and brought up the killing on their own. *Id.* The aim of the study was to assess the effect of remorse on a jury's decision to impose a sentence of death or life without parole. Figures were drawn from the California segment of the Capital Jury Project (CJP) which involved a study of thirty-seven capital cases which were tried to juries during the years 1988 to 1992. *Id.*

95. See Cassell, *supra* note 92, at 465.

96. Even studies of trials in the 1920s and the 1950s reveal that very few defendants refused to testify at trial and that few were helped by such refusals. See ARTHUR TRAIN, *THE PRISONER AT THE BAR* 209-12 (1923) (referring to an empirical study revealing that only twenty-three out of 300 defendants choose to remain silent at trial (twenty-one of these were convicted anyway)). In their study of the American jury, Kalven and Zeisel describe an empirical Chicago jury study of trials conducted during the middle and late 1950s showing that ninety-one percent of defendants without prior records and seventy-four percent of those with prior records, chose to testify at trial. KALVEN & ZEISEL, *supra* note 82, at 146.

felony trials in the 1980s illustrates the decline in defendant testimony.⁹⁷ Nearly one-half of felony defendants did not testify at trial and twenty-three percent of this group was acquitted,⁹⁸ while fifty-seven percent of misdemeanor defendants chose not to testify at trial and thirty-four percent were acquitted.⁹⁹ A study of thirty-seven capital jury trials in California from 1988 to 1992 revealed that "with a few notable exceptions, most defendants did not testify."¹⁰⁰ Only twenty-seven percent testified at the guilt phase and only twenty-two percent testified at the penalty trial (four defendants testified at the penalty phase only, while four testified at both). Thus, only thirty-eight percent of the defendants took the stand either at the guilt or the penalty trial. While studies on the number of defendants who testify are few, these results are consistent with my own observations and inquiries with trial lawyers and judges: while much depends on the particular charge and defense, the nature of the evidence, and the defendant's criminal record, the extent of refusals to testify varies from one-third to well over one-half in some jurisdictions. The failure of American defendants to testify has become so common that even the public rarely notices when the defendant does not take the witness stand. For example, of those who have seen the movie, *Reversal of Fortune*, how many were aware, much less thought it unusual, that Claus von Bulow failed to tell his story to the jury in either trial?¹⁰¹

European practice provides a stark contrast. In continental Europe, nearly all defendants choose to testify.¹⁰² Likewise, in England, it is the rare case in which the accused does not take the stand and give evidence.¹⁰³ The CJPOA¹⁰⁴ which permits adverse inferences from silence in Great Britain has had a "marked impact on both pre-trial and trial practices" with a notable reduction in the exercise of silence among suspects in police custody and more defendants

97. Schulhofer, *supra* note 16, at 329-30.

98. *Id.* at 329-30 (citing Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1080 (1984)). Of the 162 felony defendants tried by a judge without a jury, seventy-nine did not testify and forty-four percent of those who remained silent were acquitted on the principal charge (some convicted on lesser counts). *Id.* at 330 n.72.

99. *Id.* at 329-30. Altogether, thirty-nine percent of those who remained silent avoided conviction on the principle charge. *Id.* at 330 n.73 (citing Stephen J. Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1985 AM. B. FOUND. RES. J. 519, 571).

100. Sundby, *supra* note 94, at 1561.

101. The movie portrayed the efforts of Alan Dershowitz and his Harvard law students in obtaining the reversal of the conviction of Doctor von Bulow for murdering his wife. Even the Rhode Island Supreme Court, in reversing his convictions for attempted murder, failed to mention the fact that he never took the stand at the trial. *See State v. von Bulow*, 475 A.2d 995 (R.I. 1984).

102. *See supra* note 1 and accompanying text.

103. Graham Hughes, *English Criminal Justice: Is It Better than Ours?*, 26 ARIZ. L. REV. 507, 590-91 (1984) (remarking that in England the case in which the defendant fails to testify is "exceptional" whereas "defendant's silence is becoming the common practice in trials in the United States").

104. CJPOA, 1994, c. 33, §§ 34-39 (Eng.).

testifying at trial.¹⁰⁵ With respect to pretrial questioning, before the CJPOA, ten percent of defendants refused all questions, thirteen percent refused some questions, and seventy-seven percent answered all questions. After the passage of the CJPOA, only six percent of defendants refused all questions and only ten percent refused some questions with eighty-four percent answering all questions.¹⁰⁶ There are few English studies regarding the effect of the CJPOA on the decision to testify at trial, but a study from Northern Ireland on the effect of an Order permitting adverse inferences from a defendant's silence supports the view that the effect has been considerable.¹⁰⁷ For those charged with scheduled offenses (terrorist cases), the proportion of defendants refusing to testify declined from sixty-four percent in 1987 to forty-six percent in 1991.¹⁰⁸ The percentage dropped further to twenty-five percent in 1995.¹⁰⁹ Those charged with non-scheduled offenses (non-terrorist cases), the proportion of defendants refusing to testify fell from twenty-three percent in 1987 to fifteen percent in 1991.¹¹⁰ By 1995, the number had dropped to three percent.¹¹¹ The authors of the study concluded that with respect to non-scheduled defendants, the Order has rendered the number refusing to testify "almost negligible" such that it is now "only in the exceptional case that such defendants will absent themselves from the witness box."¹¹²

There are several reasons for the American trend toward more reliance on silence, but much has to do with the high costs encountered in speaking to the police and testifying at trial. Consequently, with strong "anti-pooling" measures already in place in the form of potent impediments to speaking, it is appropriate to ask whether we need a powerful right to silence in order to achieve "anti-pooling" that Seidmann and Stein believe is so important to the credibility of innocent suspects and defendants. In fact, with both the safe harbor in silence and the penalties associated with speaking, we may be guilty of "anti-pooling" overkill which can be highly harmful to innocents when silence replaces more than convincing fabrications.¹¹³

105. Tom Bucke et al., *The Right of Silence: The Impact of the Criminal Justice and Police Order Act 1994*, Home Office Research Study 199 at 69 (2000).

106. *Id.* at 31.

107. See generally *id.*; John Jackson et al., *Legislating Against Silence: The Northern Ireland Experience*, Northern Ireland Office Research & Statistical Series: Report No. 1 (2000).

108. Jackson et al., *supra* note 107, at 130.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 131.

113. See *infra* Part III.B regarding the consequences of the guilty switching from confessions or ineffectual denials to silence.

II. VALIDITY OF MARKET ANALOGIES, GAME-THEORETIC ASSUMPTIONS, AND THE "ANTI-POOLING" THEORY

A. *Validity of Market Analogies*

1. *The One-Shot Trial and Juror Awareness.*—According to Seidmann and Stein's car market analogy, if fewer lemon-sellers make claims of good quality, buyers will tend to give greater credence to apple-sellers touting their cars and acquit more innocent defendants.¹¹⁴ However, this theory rests on the assumption that car buyers generally are aware of overall market practices—that the buyers operate in a changing market in which they are exposed to numerous statements of sellers praising their cars and that buyers will give greater weight to such statements when they come to realize that fewer lemon-sellers are touting their cars. Innocent defendants become more credible because the protective right to silence has induced more guilty suspects to choose silence over fabrication. Without the right to silence, buyers will give less credence to statements of good quality when they become aware that among car-touting sellers in general, the proportion of liars (lemon-sellers) has risen. In short, a market model hinges on buyer (factfinder) experience in a changing market.

While it is possible that in the context of the pretrial investigation, buyers (police and prosecutors) listening to the accounts of numerous suspects and defendants may be aware of a changing market, such awareness is unlikely in the jury trial context since normally jurors are not "market conditioned" by serving in numerous trials. Unlike trial jurors in Sixteenth and Seventeenth Century England who were conditioned from the experience of hearing consecutive cases,¹¹⁵ today's jurors often sit for only one or two trials and have little or no market savvy or experience. Today's jurors rarely return to the market place of exonerating statements.

2. *Tasting the Fruit and Testing the Cars.*—Even if some jurors might gain extensive trial experience, jurors differ from used car buyers in another crucial aspect. They do not buy, take home, and test the cars (i.e., the exonerating statements of criminal defendants). They convict, acquit, or "hang," and go home, usually without any confirmation of the accuracy of their decision or feedback regarding the truth or falsity of the defendant's testimony. Factfinders can never be absolutely certain of the guilt or innocence of defendants, particularly in cases where the defendant claims innocence and the evidence of guilt is not crystal clear. Thus, even if the right to silence reduces the frequency of lemon-sellers touting their cars, jurors have no way of knowing whether the shrinking pool of suspects and defendants proclaiming innocence is due to more guilty suspects remaining silent (thus increasing the proportions of innocents in the pool of those making exonerating statements) or to other factors such as more guilty

114. See *supra* note 64.

115. See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 273 (1978) (describing how from the 1500s through the early 1700s, single juries would sit for several days hearing dozens of cases and becoming "old hands" at the process).

suspects confessing or plea bargaining or fewer innocent suspects arrested or prosecuted. We are left with the unlikely possibility that American society in general, and prospective jurors in particular, will somehow become aware of the fact that defendants at their trials are taking the stand and lying more or less frequently (depending on the availability of the silence right).

Finally, Seidmann and Stein's theory claims that the statements of innocent suspects become significant only where the incriminating evidence is of "intermediate strength" (but not in other cases) and that in such cases factfinders will draw "a favorable inference from any exculpatory statement" since innocent suspects alone will make them.¹¹⁶ Thus, the "anti-pooling" theory will operate efficiently only in the unlikely event that jurors are sophisticated enough to know the type of cases in which such inferences are appropriate and use it in those, but not other cases.

3. *The Limits of Real World "Anti-Pooling."*—In another respect Seidmann and Stein's hypothetical marketplace differs from the real world of police interrogation and trial. In the authors' ideal market world, all lemon-sellers would choose silence over lies and the claims of innocent apple-sellers would always be believed.¹¹⁷ However, even with the right to silence in place in the form of the no-adverse-inference rule and *Miranda* requirements, most suspects do not exercise the right during police questioning, but either confess or fabricate.¹¹⁸ As noted earlier, only about twenty percent of suspects assert their silence rights and refuse to make any statement to authorities,¹¹⁹ while somewhat less than fifty percent confess.¹²⁰ Thus, the remaining thirty percent are either guilty fabricators or innocent truth-tellers. At trial, the proportion of defendants remaining silent is larger, but in view of the fact that virtually no defendant takes the stand and confesses, the pool of those testifying and claiming innocence most likely is even larger. Thus, there is a limit to what carrots and sticks can do to persuade suspects and defendants to refrain from contesting guilt. With the large pool of exonerating statements by guilty and innocent suspects, any incremental increase in this pool that might be caused by limiting the right to silence most likely would not be substantial enough to decrease the factfinder's perception of the credibility of claims of innocence.

B. *Assessing Benefits to the Innocent from "Anti-Pooling"*

Assuming that "anti-pooling" can affect the factfinder's evaluation of claims

116. Seidmann & Stein, *supra* note 18, at 462, 469.

117. With the right to silence, the guilty would "separate themselves from the innocent suspects by exercising the right," rather than falsely replicating their exculpatory statements and reducing their credibility, resulting in the jury drawing "a favorable inference from any exculpatory statement, and innocent suspects (who alone make such statements) are thus acquitted." *Id.* at 462, 469.

118. *See id.* at 448.

119. *See supra* note 93 and accompanying text.

120. *See supra* note 93 and accompanying text.

of innocence, one must closely question the validity of some of the assumptions of the “anti-pooling” theory in terms of how much the innocent might be helped through the exercise of the right to silence by those who otherwise would lie and confuse factfinders. Even if “pooling” can have an adverse effect on the credibility of innocent suspects, how much, if any, does the exercise of the right to silence by the guilty “minimize[] the risk”¹²¹ of wrongful convictions brought about by rejection of their true statements?

Seidmann and Stein focus on the value of the right to silence from the perspective of what would occur if the right were eliminated. That is, how would guilty suspects react and what would be the effect of that reaction on the innocent? Taking this approach, assessing the benefits to the innocent from the “anti-pooling” effect of silence created by the guilty, requires asking what proportion of innocents who are now believed and acquitted would be disbelieved and convicted if the right to silence were eliminated and more guilty suspects spoke rather than remained silent? This analysis entails both identifying innocent suspects who are in a position to benefit from “anti-pooling” and would be harmed by its elimination as well as determining the number of guilty people who, without the right to silence, would speak in a way that would hurt the innocent. This latter inquiry requires an estimation of how many guilty suspects and defendants who now choose silence would speak if the right to silence were not available, how many of these guilty speakers would tell lies rather than confess, and how many of these fabricators would lie in a way that harms the innocent.

1. *Identifying Innocent Suspects Who Would Be Harmed by Fewer Guilty Suspects Remaining Silent.*—In our concededly imperfect criminal justice system, how many innocent people are convicted and how many more, if any, would be convicted if more guilty suspects spoke rather than remained silent because of the absence of the silence right? Of course, we have no way of knowing the precise number of innocent suspects who plead guilty or are found guilty by juries, but Seidmann and Stein believe that the number would be greater without the right to silence. However, they assume that not all innocent suspects benefit from the “anti-pooling” effect of exercise of the right to silence by guilty suspects, and they seek to identify the particular group of innocent suspects whose true accounts would be disbelieved because of the presence of more convincing fabricators. If the incriminating evidence is weak, Seidmann and Stein believe that innocent suspects have no need for and are not assisted by the “anti-pooling” effect of the right to silence,¹²² and in “such cases the guilty suspect gains by exercising the right without affecting the fate of any innocent suspect.”¹²³ When prosecution evidence is “very strong” the authors concede that “anti-pooling” will not help the innocent since the guilty will confess rather than fabricate regardless of the silence right because they would desire the benefits of

121. Seidmann & Stein, *supra* note 18, at 457-58.

122. *Id.* at 461-62.

123. *Id.* at 470. In these cases, the right to silence helps the guilty alone, just as Bentham claimed. *Id.* at 468.

the confession premium.¹²⁴ Thus, the authors recognize that the only innocent defendants who will be helped by exercise of the right to silence by the guilty are those facing incriminating evidence "of intermediate strength."¹²⁵ The benefits to the innocent from exercise of the right to silence by the guilty fall only on those suspects and defendants who face incriminating evidence "of intermediate strength" but who "cannot corroborate their responses."¹²⁶

2. *Assessing the Reaction of the Guilty to Elimination of the Right to Silence.*—The value to the innocent of the "anti-pooling" effect of the right to silence according to Seidmann and Stein's model also largely depends on what the guilty would do if deprived of the right. Assessing the value of "anti-pooling" to the innocent requires looking at the group of guilty suspects and defendants who now choose silence over speaking, and asking how many would choose to speak if faced with the threat of adverse inference from silence. Moreover, of those guilty people who would choose to speak if the right to silence were eliminated, how many would tell lies rather than confess? Finally, one must ask what proportion of such fabricators would lie in a way that harms the innocent by confusing factfinders and causing them to render unjust convictions?

3. *The Market Analogy and Silent Lemon-Sellers.*—Seidmann and Stein assume that without a right to silence, the only option for guilty suspects would be to speak to the police and to testify in court.¹²⁷ However, in doing so, the suspects would fabricate rather than confess. As a result, their untrue statements would "pool" with those of the innocent and increase the likelihood of an innocent suspect's conviction. Specifically, the authors assume that, absent the right to silence, guilty suspects acting rationally always would speak, whether the evidence against them is weak, moderate, or strong, although it is only in "intermediate strength" cases where the innocent will be harmed by their fabrications.¹²⁸ However, is it reasonable to assume that, without protections from adverse inferences, all suspects would talk to the police and testify at trial rather than remain silent and accept the consequences of adverse inferences?

Even in England, where adverse inferences from silence was permitted by the CJPOA, some suspects still refuse to speak to the police.¹²⁹ One would assume

124. *Id.* at 509-10. Again, I part company with Seidmann and Stein's assumption that the guilty generally will act rationally in the context of pretrial interrogation. However, if the incriminating evidence is very strong, such as fingerprint or DNA identification, it likely would overwhelm any marginal increase in the believability of true statements which might be caused by the "anti-pooling" effect of the guilty's exercise of the right to silence.

125. *Id.* at 461-62, 509.

126. *Id.* at 503.

127. *See id.* at 473 (stating that absent the right to silence, the felon's "only option is to give a statement to the police and subsequently to testify in court"); *see also id.* at 492 (stating that absent the right to silence, a guilty defendant at trial "would have no choice but to imitate an innocent defendant by lying").

128. *Id.* at 467-70.

129. *See Bucke et al., supra* note 105, at 31, 69 (finding that before the 1994 Act ten percent

that in America an even greater proportion of suspects would refuse to cooperate. Americans do not share with the Europeans that feeling of confidence in authority and that sense of responsibility which motivates the vast majority of European suspects and defendants to cooperate and speak to police and judges.¹³⁰ Even with the prospect of adverse inferences from silence, many American defense lawyers would continue to advise suspects to remain silent, particularly in weak cases where there is a good chance that without a confession, the prosecution could not satisfy its burden of proof. In England where lawyers are less contentious,¹³¹ solicitors nonetheless often will advise suspects to remain silent when the evidence against them is weak despite the threat of adverse inferences following the CJPOA.¹³² Furthermore, it is likely that many seasoned criminals and those arrested for serious offenses would still remain silent.¹³³ Given that approximately twenty percent of suspects now refuse to speak to police, even if one-half would speak if threatened with adverse inferences, the increased "pooling" effect would be limited to about ten percent of those interrogated.

With respect to testifying at trial, as pointed out earlier, the dangers encountered by taking the stand, such as impeachment with prior convictions and illegally obtained evidence, are such that with increasing frequency defendants are not testifying as they once did. The result is that refusals to testify are reaching over one-half in some jurisdictions. The threat of adverse inferences from silence would do little to convince a defendant to take the stand when he faces the prospect that cross-examination which exposes a criminal record or incriminating evidence will be much more damaging than mere suggestions that

refused to answer all questions and thirteen percent refused some questions, whereas after the Act, six percent refused all questions and ten percent refused some questions).

130. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 505-506 (1992) (discussing how the basic assumptions underlying the European non-adversary approach cut against the grain of our national character which emphasizes fear and distrust of governmental power).

131. See *id.* at 435-37 (describing American criminal trial lawyers as more aggressive and contentious than either continental or English advocates, and viewing themselves as semantic warriors in pursuit of that most important goal—winning the case).

132. The *Law Society Guidelines* for solicitors were revised in response to the 1994 Act and stated that if the solicitor is "unsure whether the police have sufficient, or sufficiently strong evidence" for the police to charge, or for the prosecution to continue with their prosecution, or for a court to convict, "the safest advice will often be that your client should remain silent." *Police Station Advice: Adverse Inferences and Waiving Privilege: Guidelines from the Criminal Law Committee of the Law Society*, July 1, 1997.

A study of the operation and effect of the Criminal Evidence (Northern Ireland) Order 1988 in the Northern Ireland Crown Court found evidence that the introduction of solicitors in police interviews led to a reduction in statements where police had evidence to hold, but not enough to convict and solicitors played it safe and advised silence. See Jackson et al., *supra* note 107, at 126.

133. In England following the 1994 Act, those arrested for serious offenses were more likely to exercise their right to silence. See Bucke et al., *supra* note 105, at 30-32.

his silence might indicate that he has something to hide.

4. *The Market Analogy and Truthful or Unbelievable Lemon-Sellers: Confessions and Refutable Fabrications.*—Assuming that, without the right to silence, marginally more guilty people would choose to speak, how many of those switching from silence would lie rather than confess and would do so in a way that harms the innocent? The “anti-pooling” theory rests on the assumption that, if the right to silence were not available, guilty suspects would fabricate in a way that would cause factfinders to distrust innocent defendants. Lemon-sellers (guilty suspects), however, may decide to be truthful and to admit their car’s defects (i.e., confess to the crime or admit the falsity of their stories) and take them off the market.¹³⁴ On the other hand, lemon-sellers might believe that they can sell their cars by making false statements touting their “outstanding” properties when in fact such statements can be investigated and rebutted before or during trial. For the absence of the right to silence to harm innocent defendants under the “anti-pooling” theory, the guilty must not only fabricate; they must do so effectively. If, without the right to silence, most guilty suspects would either confess or fabricate ineffectively, there would be no benefit to the innocent from depriving the guilty of that right.

Leaving aside the many guilty suspects who would confess either with or without the right to silence, Seidmann and Stein conclude that, given sufficiently weak evidence, the guilty will inevitably choose silence regardless of the resulting adverse inferences.¹³⁵ If the incriminating evidence is sufficiently strong, they conclude that the right to silence “becomes irrelevant to behavior,” because the guilty always will prefer “to confess and enjoy the small but positive remission of sentence.”¹³⁶ Consequently, the right to silence helps innocent suspects only when the incriminating evidence is of “intermediate strength”¹³⁷ because only then will guilty suspects “separate themselves from the innocent suspects by exercising the right to silence” rather than “falsely replicating their exculpatory statements” thereby reducing their credibility.¹³⁸ However, “intermediate” or lesser strength evidence may be made to appear overwhelming to the suspect. When interrogating officers exaggerate the strength of prosecution evidence, an “intermediate strength” case may easily fall into the strong case category, in which the right to silence becomes irrelevant. Furthermore, what might appear to all parties to be a very strong case sometimes will fall apart during the course of investigation or trial.

134. This may occur outside the context of plea bargaining such that guilty suspects do not benefit by selling their rights to silence and to jury trial at a discount.

135. See Seidmann & Stein, *supra* note 18, at 469.

136. *Id.* Seidmann and Stein claim that “when the circumstantial evidence is strong, the right to silence does not affect behavior.” *Id.* at 470. Apparently, they either ignore or discount the many “dead cases,” well known to public defenders, in which guilty defendants maintain their claims of innocence at trial rather than either confessing or accepting a plea bargain.

137. *Id.* at 461-62.

138. *Id.* In such cases the jury “draws a favorable inference from any exculpatory statement, and innocent suspects (who alone make such statements) are thus acquitted.” *Id.* at 469.

Contending that the right to silence is used only by those who otherwise would fabricate, Seidmann and Stein argue that those who would confess or make damaging statements would do so whether or not there is a right to silence. Defendants in cases of moderate or intermediate strength generally would choose to lie rather than to confess if the right were unavailable.¹³⁹ Additionally, suspects who would confess absent the right to silence “would not switch to silence were [it] to become privileged.”¹⁴⁰ In short, the right to silence causes the guilty to switch from lies to silence, but not from truth to silence. This assumption is central to the validity of the “anti-pooling” thesis.

Yet is it reasonable to assume that, of those guilty suspects who now exercise the right to silence but who would speak if the right were not available, few would confess, fabricate unconvincingly, or make statements that could be refuted? First, guilty suspects are not all equally able or predisposed to lie. For some, lying is a way of life and doing it effectively comes naturally. Others may either lack convincing stories or consider themselves bad liars and, realizing, as do Seidmann and Stein, that it is not easy to give convincing, irrefutable fabrications,¹⁴¹ will either clam up or confess. In fact, it seems reasonable to assume that many, if not most, guilty suspects choose to remain silent because they have no convincing stories to tell and the alternatives—confessions or ineffective lies—are unappealing.

Thus, even if most guilty suspects would switch from silence to lies if the right to silence were not available, many would not do it very well. In fact, with the present right to silence, most guilty suspects who choose to speak to the police do not do so very effectively, as Seidmann and Stein recognize. Police interrogation, they reason, places the guilty between a rock and a hard place and, though it has costs, remaining silent will generally be the lesser of two evils for suspects. In the context of pretrial interrogation, a guilty suspect has two choices, both of which “[worsen] his position” because he must “move first” without full knowledge of the available evidence against him.¹⁴² Seidmann and Stein, however, believe that pretrial silence is less damaging than fabrication, because there is a good chance that refuting evidence is or will become available to discredit the false story.¹⁴³ For guilty suspects, “silence is usually the better choice.”¹⁴⁴ Yet the guilty usually fail to choose silence. Most often, they make

139. See *id.* at 499.

140. *Id.* at 470.

141. Seidmann and Stein concede that in the context of pretrial police questioning, there is a good chance that refuting evidence will be available. *Id.* at 447. They note that the guilty usually make “the worst possible move” by either confessing or fabricating an account susceptible of refutation. *Id.* at 464.

142. See *id.* at 447.

143. See *id.*

144. See *id.* at 448. Seidmann and Stein describe the cost of pretrial silence to the guilty suspect as the confirmation of the authorities’ belief that the suspect is guilty which induces them to concentrate on proving it. *Id.* at 446. This cost, however, generally is minimal compared with the cost of either confessing or fabricating an easily refuted statement.

"the worst possible move" by either confessing or fabricating an account susceptible of refutation.¹⁴⁵ If most guilty suspects who now choose to speak to the police do so ineffectively, why should we assume that, if more choose speaking over silence, they would fabricate convincingly?

Finally, we might listen to experienced criminal lawyers, who generally agree that successful fabrication during police questioning is the exception rather than the rule. Prosecutors and police prefer for suspects to make pretrial statements, even if they are fabrications,¹⁴⁶ and defense lawyers clearly do not want their clients speaking to the authorities. Like Seidmann and Stein, the police and prosecutors recognize that under "stressful interrogation" and with "asymmetric information" the guilty most often make "the worst possible move" by either confessing or fabricating an account susceptible of refutation.¹⁴⁷ Even convincing denials of guilt, which are consistent with a defendant's eventual contentions, usually do not help the defendant at trial because they are generally inadmissible hearsay when offered by the accused.¹⁴⁸

C. *Distinguishing Between Pretrial and Trial Silence*

Assuming that there are benefits in separating false from true claims of innocence, one might consider the degree of "pooling" dangers present in different contexts. By this measurement, the "anti-pooling" theory works less well in the pretrial context than it does at trial.¹⁴⁹ Consequently, the "anti-pooling" analysis suggests that there is good reason to be skeptical of an expansive right to silence in the context of pretrial interrogation.

First, the guilty are less likely during pretrial questioning than at trial to be able to lie in ways that "pool" with the accounts of the innocent. According to the "anti-pooling" theory, "[o]nly the existence of a meaningful fabrication alternative should . . . activate the privilege" so if the guilty "cannot fabricate evidence in a way that harms the innocent," they should not enjoy the privilege

145. See *id.* at 464.

146. Prosecutors and police detectives believe that interrogations are essential. See Cassell, *Protecting the Innocent*, *supra* note 35, at 498. Professor Cassell observed that "virtually every detective to whom I spoke insisted that more crimes are solved by police interviews and interrogations than by any other investigative method." *Id.* (quoting Richard A. Leo, *Police Interrogation in America: A Study of Violence, Civility and Social Change* (1994) (unpublished Ph.D. dissertation, Univ. of Cal. at Berkeley)). Cassell and Hayman's poll of prosecutors found that sixty-one percent believed that incriminating statements were either essential or important in obtaining a favorable outcome. See Cassell & Hayman, *supra* note 93, at 906.

147. See Seidmann & Stein, *supra* note 18, at 464.

148. See *supra* note 74.

149. Seidmann and Stein discuss the argument that the right to silence might be less potent at trial than during pretrial interrogation in persuading the guilty to refrain from fabricating, and suggest that there are good arguments on both sides of the question. See Seidmann & Stein, *supra* note 18, at 491-92.

to remain silent without consequence.¹⁵⁰ Thus, the opportunity to “shape [the] content” of evidence justifies applying the privilege to testimonial evidence, but not to physical evidence.¹⁵¹ Taking this approach, the greater the opportunity that a guilty person has to “shape [the] content” of a statement, such that the fabricated evidence harms the innocent through the “pooling-through-lying alternative,”¹⁵² the stronger the argument for the right to silence as an attractive alternative. The less a particular context provides such a “shape [the] content” alternative, the less justification there is for the right. During the pressure-packed process of custodial interrogation, it is often very difficult to fabricate effectively because the suspect generally will be confronting the authorities without counsel and without knowledge of the evidence possessed by his interrogators.

On the other hand, at trial the defendant usually has been provided by counsel with knowledge of the prosecution’s case and has had the opportunity to wait until all prosecution and defense witnesses have testified before making the decision whether to take the stand.¹⁵³ American criminal defense attorneys carefully calculate whether it is in their clients’ best interest to take the stand and will not hesitate either to “prepare” them to testify or advise silence if the dangers in testifying appear to outweigh the potential benefits.¹⁵⁴ Occasionally, defense attorneys may devise methods to convince their “unconvincing” clients that they would be better off to remain silent. For example, O.J. Simpson may well have desired to testify (as do most defendants who think they can persuade the jury of their innocence), but the defense team engaged talented defense lawyers to act as prosecutor and aggressively cross-examine him. Evidently convinced to take the safer course, he did not testify.¹⁵⁵

Second, even if a defendant is able to lie effectively during pretrial questioning, and his lies may pool with the true accounts of innocent suspects who speak to police, those lies generally are inadmissible on his behalf and thus will not have a pooling effect at the trial stage. While the prosecution may almost always use defendant’s pretrial statements against him, only in limited

150. *Id.* at 480.

151. *Id.* at 475-76.

152. *Id.* at 476.

153. *See Brooks v. Tennessee*, 406 U.S. 605 (1972) (holding that the state’s attempt to counter defense tailoring of its evidence by requiring the defendant to testify at the outset of the defense or not at all was an unconstitutional burden on defendant’s right to testify).

154. Professor Pizzi accurately describes our system as “at the extreme in openly encouraging the presentation of evidence at trial that has the palm prints and fingerprints of the lawyers all over it as the evidence is shaped, reshaped, and sometimes distorted a bit for adversarial advantage.” *See PIZZI, supra* note 39, at 126.

155. *See People v. Simpson*, No. B.A. 097211 (Cal. Super. Ct., Oct. 3, 1995). He did, however, request the opportunity to personally address the jury prior to the defense opening statements. The request was denied. In the later civil case, in which he had no privilege against self-incrimination, his unconvincing testimony was a factor leading the jury to find liability and impose substantial damages. *See Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Ct. App. 2001).

situations will the defendant be permitted to introduce his own exonerating story to police.¹⁵⁶ In short, convincing fabrications during police interrogation pose fewer pooling dangers than do convincing fabrications at trial.¹⁵⁷

Finally, the right to silence is a greater help to the innocent at trial than it is during pretrial interrogation. At trial, innocent defendants may legitimately fear impeachment with their prior criminal record, cross-examination by an aggressive prosecutor, or exploitation of personal traits which might damage their credibility. The Supreme Court has recognized that even a truthful defendant may decide not to take the stand out of fear of not being a credible witness. "Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him."¹⁵⁸ Because of these trial-specific considerations, trial silence often is less probative of guilt than pretrial silence. Because the exercise of the right to silence by the innocent is more likely at trial than in the pretrial context, the right seems more justified at this later stage.¹⁵⁹ Assuming that there are benefits from avoiding the "pooling" of false and true claims of innocence, these practical considerations regarding the use of the right to silence suggest that we should be particularly hesitant to expand the right in the context of pretrial questioning.

D. Empirical Evidence Testing the "Anti-Pooling" Theory

Testing the "anti-pooling" theory's assumptions regarding the reaction of the guilty to the reduction or elimination of the right to silence is extremely difficult in light of the absence of a domestic laboratory in which the right is present and then taken away. We can, however, look at the opposite situation from the mid-1960s, when the *Miranda* decision abruptly expanded the right to silence. Numerous studies have found that *Miranda*'s expansion of the pretrial right to silence reduced confession rates, although the extent of the reduction has been

156. See discussion *supra* note 74.

157. Furthermore, the number of innocent suspects who are interrogated by police is much larger than the number of innocent defendants who face trial.

158. *Wilson v. United States*, 149 U.S. 60, 66 (1893). See Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence*, 31 COLUM. HUM. RTS. L. REV. 243 (2000) (contending that, because drawing adverse inferences from the accused's failure to take the witness stand may be more problematic than doing so following the accused's failure to speak to the police, if adverse inferences for failure to testify are permitted, "its scope could be limited to the impeachment of any defense which the accused offers through other evidence"). *Id.* at 261.

159. On the other hand, some fairness considerations seem to point in the opposite direction. One may argue that drawing adverse inferences from failure to testify at trial is less objectionable than drawing adverse inferences from silence during police interrogation because, at trial, the accused usually knows the full extent of the case against him before deciding whether to testify and has had an opportunity to reflect on the situation with advice of counsel.

the subject of extended debate, with *Miranda* critics pointing to a sixteen percent reduction in confessions and *Miranda* supporters arguing that the reduction was no more than four percent.¹⁶⁰ But reduced confession rates following *Miranda* strongly suggest that some, who would previously have confessed, claimed the expanded right to silence. Nevertheless, Seidmann and Stein dismiss the evidence of reduced confession rates as “too contaminated with measurement error.”¹⁶¹ Even if most who claimed the new expanded right to silence switched from lies to silence rather than from confessions to silence, evidence of reduced crime clearance rates following *Miranda* suggests that the lies they would have told would have damaged their cases and contributed to their conviction.¹⁶² Reduced confession and crime clearance rates following *Miranda*’s expansion of the right to silence is consistent with Seidmann and Stein’s acknowledgments that “the right to silence reduces convictions of both innocent and guilty defendants,”¹⁶³ and that “one can attribute changes in the confession rate to the relevant enhancement (or weakening) of the right to silence.”¹⁶⁴

Failing to find domestic studies supporting their theory and in the face of contrary *Miranda* studies, Seidmann and Stein turn overseas and cite British studies concerning the consequences of the CJPOA,¹⁶⁵ which eliminated in certain circumstances the rule against drawing adverse inferences from either silence during pretrial interrogation or from failing to testify at trial.¹⁶⁶ The

160. See Cassell, *supra* note 92, at 447 (reviewing American studies and finding a sixteen percent nationwide drop in confession rates following *Miranda*); see also Van Kessel, *supra* note 92, at 128 (reviewing American studies conducted after *Miranda* became common knowledge and noting that they “detected some increase in refusals and some decline in confession rates”).

Stephen Schulhofer disputes Cassell’s calculations and contends that the studies show that the confession rate fell by, at most, 9.7% when compared with regimes without warnings which used only the traditional voluntariness test, and by only 6.4% when compared with regimes using some warnings. See Schulhofer, *supra* note 93, at 538-39. Schulhofer concludes that, with further “necessary adjustments,” the decline in confession rates becomes only 5.8%, when compared with regimes without warnings and 4.1% when compared with regimes using some warnings. *Id.* at 545. Cassell responded to Schulhofer contending that studies before *Miranda* found that defendants made damaging admissions in well over fifty percent of cases, while, after *Miranda*, the rates dropped considerably, varying from twenty percent to fifty percent. See Cassell, *supra* note 93, at 1091-92.

161. Seidmann & Stein, *supra* note 18, at 500 (stating that the studies are not reliable enough to support the thesis that the right to silence causes guilty defendants to switch from confessions to silence).

162. See *supra* note 93.

163. Seidmann & Stein, *supra* note 18, at 473.

164. *Id.* at 437 n.20.

165. 1994, c. 33, §§ 34-39 (Eng.).

166. See Bucke et al., *supra* note 105, at 199.

The caution given to suspects in England has been revised several times. The first caution was:

You do not have to say anything. But if you do not mention now something which you

studies were conducted before and after the passage of the CJPOA and found that, while the CJPOA had a "marked impact on both pre-trial and trial practices" including "a notable reduction in the exercise of silence among suspects in police custody" and "more defendants . . . testifying at trial,"¹⁶⁷ there was no evidence that the new provisions encouraged more confessions. Both before and after the CJPOA, about fifty-five percent of suspects confessed during police interviews.¹⁶⁸ Nor did the CJPOA affect the conviction rate.¹⁶⁹ Nevertheless, police officers preferred fabricated stories to silence, because the lies gave them something to investigate; if the accounts proved false, they strengthened the prosecution's case and were regarded as much more valuable than any adverse inferences drawn in court.¹⁷⁰

A Northern Ireland study not discussed by Seidmann and Stein also seems to support their theory. The study focused on the effect of the Criminal Evidence (Northern Ireland) Order,¹⁷¹ which was the basis for the CJPOA and which also permitted the factfinder to draw adverse inferences from silence both during police questioning and at trial.¹⁷² The study examined Belfast Crown Court cases in the years directly before the implementation of the Order through 1995.¹⁷³ Although the Order resulted in fewer defendants remaining silent and may have assisted the police investigating crime and prosecutors in proving their particular cases,¹⁷⁴ the study found that the Order had no effect on solving crime, guilty pleas, or conviction rates.¹⁷⁵

later use in your defence, the court may decide that your failure to mention it now strengthens the case against you. A record will be made of anything you say and it may be given in evidence if you are brought to trial.

Police and Criminal Evidence Act, 1984 c. 60 (Eng.) [hereinafter PACE]; Codes of Practice, Draft Revisions for Consultation 45 § 10.4 (1994) (Eng.).

The caution has been shortened to: "You do not have to say anything, but I must caution you that if you do not mention when questioned something which you later rely on in court, it may harm your defence. If you do not say anything it may be given in evidence." ENGLISH AND NORTHERN IRELAND CODES OF PRACTICE § 10.5.

167. Bucke et al., *supra* note 105, at 69.

168. *Id.* at 34.

169. *See id.* at 74.

170. *See id.* at 35.

171. Criminal Evidence (Northern Ireland) Order 1988.

172. *See* Jackson et al., *supra* note 107.

173. *Id.* at 40-44.

174. *Id.* at 151. In fact, with regard to non-terrorist cases, the Order appeared to have had a contrary effect from what was expected—a marked decline in conviction rates in contested cases. *Id.* at 144.

175. *Id.* at vi. In fact, the rate at which non-terrorist defendants pled guilty declined in the years following the Order. By 1997, however, the rate had increased to near its pre-Order level. *Id.* at 139-40.

E. The Limited Value of Comparative Studies

Seidmann and Stein's comparative analysis illustrates the dangers of drawing general conclusions from the impact of specific alterations to particular aspects of the right to remain silent in foreign legal systems with very different procedural rules and professional legal culture from the United States. The rule against adverse inferences cannot be analyzed meaningfully in isolation, but must be considered in relation to both other aspects of the right and the procedural context in which it operates.

First, unlike *Miranda* and related interrogation rules, the codes of England and Northern Ireland provide both a meaningful right to consult with a lawyer prior to a police interview and the right to have a lawyer present during the interview. These rights are given effect through a system of stationhouse legal advisors, which results in approximately forty percent of suspects receiving legal advice prior to police station interrogations.¹⁷⁶ *Miranda* rules do not guarantee a right to consult with a lawyer, but only the right not to be questioned after a lawyer is requested.¹⁷⁷ The result is that American interrogations rarely take place in the presence of defense counsel. Furthermore, the new English silence

176. Jackson et al., *supra* note 107, at 116. The Police and Criminal Evidence Act, 1984 required that the police generally must interview suspects at the police station and provided a statutory right "to consult a solicitor privately at any time." *Id.* §§ 56, 58. The Code of Practice, however, states that, with certain exceptions, "a person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it" and provides that the person must be allowed to have the solicitor present whenever he is interviewed if a solicitor is available. CODE OF PRACTICE FOR THE DETENTION, TREATMENT AND QUESTIONING OF PERSONS BY POLICE OFFICERS (1985) [hereinafter CODE OF PRACTICE] § 6.3-6.5. In *Condron v. United Kingdom*, 31 Eur. Ct. H.R. 1 (2000), the European Court of Human Rights held that, provided appropriate safeguards are in place, "it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution," *id.* at ¶ 56, but that access to legal advice and the physical presence of a solicitor during a police interview is a "particularly important" safeguard for dispelling any compulsion to speak which may seem inherent in the terms of the caution. *Id.* ¶¶ 60-61. Britain responded with the Youth and Justice Criminal Evidence Act 1999 (Eng.) [hereinafter YJCEA] and the Criminal Evidence (Northern Ireland) Order 1999, which prevent a court or jury from drawing adverse inferences until access to legal advice has been offered to suspects who are being interviewed in a police station or other "authorized place of detention." YJCEA § 58; Order Art. 36. Consequently, more suspects in both England and Northern Ireland are requesting and receiving legal advice. In Northern Ireland, from 1992 to 1997, 34.5% of non-terrorist suspects and ninety-three percent of terrorist suspects requested legal advice. See John D. Jackson, *Silence and Proof: Extending the Boundaries of Criminal Proceedings in the U.K.*, INT. J. OF EVID. AND PROOF 145, 169 n.111 (2001).

177. See *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that *Miranda* does not require that attorneys be producible on call and that it is sufficient for police to tell a suspect that there is no way of furnishing him with a lawyer during questioning but that one will be appointed for him if and when he goes to court).

rules led to more disclosure of police evidence prior to police interviews.¹⁷⁸ Earlier and fuller discovery of the prosecution's case arms a suspect with important knowledge and allows him to tailor his statement accordingly.¹⁷⁹ This is particularly true when the suspect is assisted by a lawyer who advises the suspect to answer questions only after discovery is provided.¹⁸⁰ If the evidence appears strong, the suspect is able to conform his statement to facts not reasonably subject to dispute. When incriminating evidence is weak and the prosecution's need for statements is the greatest, solicitors often will advise silence.¹⁸¹ The Northern Ireland study found that the presence of solicitors at police interviews has led to fewer statements by suspects where police have enough evidence to hold an individual, but not enough evidence to convict.¹⁸² The report's authors speculated that in such cases, solicitors might play it safe and advise silence whereas prior to the Police and Criminal Evidence Act of 1984,¹⁸³ defendants without advice might well have spoken.¹⁸⁴ Although the new rules led to solicitors advising silence and suspects claiming it less often, solicitors still confidently advised silence in cases where they believed the police were conducting "fishing expeditions" or where "there was no real evidence against the client."¹⁸⁵ Finally, new defense tactics have been devised to cope

178. While authorities have no legal duty to provide pre-interview disclosure of their case, lack of disclosure may provide good reason for a suspect to remain silent, which would preclude the drawing of adverse inferences. Although courts have not required full disclosure in every case, the consensus was that the police in both England and Northern Ireland were providing more information to legal advisors than before the new right to silence rules. See Jackson, *supra* note 176, at 158-61. Furthermore, most solicitors in Northern Ireland were satisfied with the information they received in non-terrorist cases and considered it sufficient for the purpose of advising their clients. See *id.* at 159.

179. Seidmann and Stein recognize that a suspect's initial responses to police questioning when "the police may play without showing their hand" disadvantages the guilty suspect in a way often "crucial to the case." Seidmann & Stein, *supra* note 18, at 443.

180. Following the CJPOA, solicitors were more likely to request disclosure of prosecution evidence and police were more likely to comply with such requests. See Bucke et al., *supra* note 105, at 23-25. The Northern Ireland study found that solicitors were much more likely to recommend answering questions in PACE cases when they received full details about the nature of the case against the suspect and full access to police interviews. In the absence of a clear view of the case against the suspect, solicitors were more inclined to advise clients not to cooperate. See Jackson, *supra* note 176, at vi, 124 nn.71-73.

181. In *R. v. Robel*, Crim. L. R. 449 (1997), the court stated that, if the interviewing officer has disclosed little or nothing, it would be good legal advice for the defendant to stay silent.

182. See Jackson, *supra* note 176, at 126.

183. Police and Criminal Evidence Act, 1984 c. 60 (Eng.).

184. See Jackson, *supra* note 176, at 126.

185. *Id.* at 160. Jackson quotes solicitors' standard advice as: "I will explain that . . . if there's a defence, it will have to be put forward. Or this is a case where it's unlikely the prosecution will proceed. So you can put forward your defence, but if you don't have a defence, then I'd advise you not to answer any questions." *Id.*

with the threat of adverse inferences, whereby suspects or their legal advisors will read out a written statement at the beginning of the interview and then refuse to expand on its content.¹⁸⁶ For these reasons, English interrogation rules seem particularly ill-suited to expose lies and encourage guilty suspects to tell the truth. In sum, if the new threat of adverse inferences in England and Northern Ireland operates to persuade suspects to abandon silence, the accompanying protections may have merely enabled suspects to fabricate more effectively.

Second, the no-adverse-inference rule with respect to pretrial silence, as it operated in England and Northern Ireland prior to the new reforms, was very different from the rule as applied in the United States.¹⁸⁷ Even before the revisions expressly allowing adverse inferences, English juries generally were made aware of a defendant's refusal to answer questions posed by police.¹⁸⁸ American juries never hear of a defendant's silence following *Miranda* warnings.¹⁸⁹ While, prior to the CJPOA, English prosecutors could not suggest to the jury that the accused's silence was suspicious, they could produce evidence of the fact of such silence and nothing prevented a jury from drawing adverse inferences.¹⁹⁰ In short, the rule against drawing adverse inferences from silence in the context of police questioning did not affect admissibility of evidence, but

In essence, the solicitor is telling the suspect, "I don't think the prosecution has enough evidence to convict you unless you confess or make damaging statements, so I advise you not to talk, particularly if you're guilty."

186. See *id.* at 158. The studies found that terrorist suspects and professional criminals often utilized tactics such as the written statement to get around the new rules.

187. The rule's operation at trial, however, was more like the current situation in this country. The 1898 Criminal Evidence Act that gave testimonial competence to the accused, also provided for a right to silence by restricting comment by the prosecutor on defendant's choice not to testify. See Carol A. Chase, *Hearing the "Sounds of Silence" in Criminal Trials: A Look at Recent British Law Reforms With an Eye Toward Reforming the American Criminal Justice System*, 44 U. KAN. L. REV. 929, 935 (1996). However, judicial comment on trial silence was not forbidden and the judge could refer to it in summarizing the evidence for the jury. *Id.* at 935. By 1994, judicial decisions had severely limited the judge's power to comment on defendant's failure to give evidence, rendering the English rule not substantially different from the rule in this country. See *R. v. Friend* [1997] 2 All ER 1011 (Eng.); SUSAN M. EASTON, *THE RIGHT TO SILENCE* 7, 10 (1991).

188. See Jackson, *supra* note 176, at 166 n.97. A study conducted before the right to silence revisions found that the jury heard of defendant's silence during police questioning in eighty percent of Crown Court trials. See M. Zander & P. Henderson, *Crown Court Study* (1993) ROYAL COMMISSION ON CRIMINAL JUSTICE RESEARCH STUDY No. 19.

189. *Miranda* itself states that the prosecution cannot use at trial the fact that a defendant exercised the right to silence. *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). Nor may such silence be used to impeach a defendant who testifies. *Doyle v. Ohio*, 426 U.S. 610 (1976) (reasoning that, while *Miranda* requires no express assurance that silence will carry no penalty, "such assurance[s] [are] implicit to any person who receives the warnings" and therefore it would be fundamentally unfair and a deprivation of due process to allow his silence to be used to impeach an explanation offered at trial.)

190. See M. Zander, *THE POLICE AND CRIMINAL EVIDENCE ACT 1984* §§53-65, at 89 (1985).

only controlled what the judge and prosecutor could say to the jury.¹⁹¹ With this aspect of the silence right so significantly different from that in the American system, the consequences of its abolition also differ. Because the rule against adverse inferences in England was not as potent as it is here,¹⁹² not as much was lost by its abolition as would be lost if the rule were eliminated in the United States. Abolition of the more protective right in this country may well have greater consequences and may result in more guilty suspects deciding to confess their crimes or to fabricate ineffectively rather than remain silent.

Furthermore, different rules regarding the admissibility of exonerating statements give suspects more to gain by lying to police and prosecutors in England than in America. Here, generally such statements are not admissible when offered by the accused and the jury never hears of them,¹⁹³ whereas in England such statements usually come before the jury as part of the prosecution's case.¹⁹⁴ Consequently, false claims of innocence made to police can benefit the defendant more in England than in the United States. Other aspects of the right to silence also are significantly different. For example, *Miranda* rules give suspects the right to cut off questioning with a request for counsel or refusal to speak, whereas police in England and Northern Ireland may continue to question and try to convince suspects to speak.¹⁹⁵ Finally, the United State's legal culture

191. Thus, even before the new rules, it was usually considered unwise for English suspects to refuse to respond when cautioned and questioned by police. See CHRISTOPHER J. EMMINS, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE 331-32 (1983); ROYAL COMMISSION REPORT, 1981, Para. 4.39, at 82. The fact of pretrial silence was known to solicitors and taken into account in their advice to suspects, increasing the pressure to make statements. The 1981 Report of the Royal Commission on Criminal Procedure recognized that it is unsafe to use such silence against a defendant for any purpose, but observed that, regardless of the rules, whatever a judge may say to a jury concerning a defendant's pre-trial silence, "does not, indeed it cannot, prevent a jury or bench of magistrates from drawing an adverse inference" and that, in relying upon the right to silence, a suspect "would be wise to have regard to how people are likely to interpret his conduct." ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1991, C.M.N.D. 8092 Para. 70, at Zanier, Para 4.39 at 82. See also R. CROSS, EVIDENCE 551 (5th ed. 1979).

192. In *Regina v. Sullivan*, 51 Crim. App. R. 102, 105 (C.A. 1966), the court found that the trial judge erred in telling the jury that, if the defendant were innocent, he would be anxious to answer questions; however, Lord Salmon observed that "[i]t seems pretty plain that all members of the jury, if they had any common sense, must have been saying to themselves precisely what the learned judge said to them." *Id.*

193. See *supra* note 74.

194. While a defendant's exculpatory statement is not admissible as substantive evidence when offered by the defendant, it usually comes before the jury as *res gestae*, because the Crown offers everything said by the defendant upon arrest and under police questioning. If not, it can be extracted from the police by the accused on cross-examination. See Glanville Williams, *The Right of Silence and the Mental Element*, CRIM. L.R. 97, 99 (1988); Archbold § 1565.

195. As long as a suspect was properly cautioned, interrogation could continue in the face of protestations and objections, subject only to the prohibition against such pressures as would render the statement involuntary. PACE did not change this principle. See Van Kessel, *supra* note 92,

is different from that in the United Kingdom. Our defense bar is much more hostile to cooperating with authorities than attorneys in England or Northern Ireland.¹⁹⁶

In sum, even accepting that, in the British context, eliminating the rule against adverse inferences caused the guilty to shift from silence to lies, rather than from silence to confessions, the result may not be the same here. In a system that does not provide suspects with lawyers during questioning who are aware of prosecution evidence and able to react accordingly, the threat of adverse inferences from silence may either convince more guilty suspects to confess or induce them to lie ineffectively, resulting in more accurate factfinding.

F. Assessing the Costs of the Right to Silence

Seidmann and Stein acknowledge that the right to silence has costs, in the form of reduced conviction rates and the acquittal of some guilty defendants,¹⁹⁷ thus conceding that Bentham was at least half-right: that to some extent the right to silence helps the guilty escape conviction.¹⁹⁸ Yet they find the "requisite cost-benefit analysis" beyond the scope of their study, in view of the difficulty in drawing meaningful conclusions when it is not known either how many innocents might be jailed without the silence right or how many guilty are now freed because of it.¹⁹⁹ Nevertheless, the authors suggest that the social benefit of fewer wrongful convictions strongly outweighs the social cost of more wrongful acquittals.²⁰⁰ They concede that the right to silence to some extent "reduces convictions of both innocent and guilty defendants,"²⁰¹ but claim that the goal of fewer convictions of innocents is worth the cost of fewer convictions of the guilty.²⁰²

at 49-50 nn.232-41; see also William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 CONST. COMMENT. 55, 65-67 (1996) (explaining that English suspects have the right to refuse to answer police questions, but, at the same time, police have the right to continue to inquire, such that when a suspect refuses to answer a question, police often will proceed to the next question.)

196. Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HAST. L.J. 477, 515-16 (1998) (describing American criminal trial lawyers as more aggressive and contentious than either continental or English advocates).

197. See Seidmann & Stein, *supra* note 18, at 499-500. They state that "the right to silence reduces convictions of both innocent and guilty defendants." *Id.* at 473.

198. Bentham may be more than half-right; Seidmann and Stein also concede that his conclusion, that *only* criminals benefit from the right to silence is correct in all cases in which the evidence against them is weak. See *id.* at 469-70.

199. See *id.* at 473.

200. See *id.* Seidmann and Stein contend that, with the prevention of wrongful convictions being of "immensely greater value to society than prevention of wrongful acquittals," retention of the silence right would be "the socially optimal choice." *Id.* at 494.

201. *Id.* at 473.

202. See *id.* at 461, 494.

However, meaningful analysis of the value of the right to silence requires some attempt to assess the expense of silence by the guilty. Because no justice system is perfect and there will always be some number of erroneous convictions, the loss of any relevant evidence, whether from restrictions on investigative methods or suppression at trial, inevitably will help some innocent people avoid wrongful convictions. A rule against interviewing eye witnesses or using their testimony in court would benefit many innocent people who otherwise would be misidentified, but the cost in terms of fewer convictions of the guilty would be enormous. Whenever probative evidence is forfeited, accurate factfinding is impaired to some degree and the crucial question becomes whether the benefits derived are worth the cost. Thus, I will make a rough attempt to assess the costs of the right to silence, in terms of fewer guilty suspects speaking to the police or to juries, and will ask whether the assumed "anti-pooling" benefits of the right to silence are worth those costs.

1. *Helping the Guilty to Help Themselves.*—How large of a "helping" are the guilty taking for themselves from the table of "social good" by using the right to silence to avoid conviction? As noted earlier, the right to silence to some extent leads to fewer confessions and rebuttable false statements and thus to more acquittals of the guilty.²⁰³ By offering a safe harbor in silence, some confessions are lost and some false stories are not adequately investigated and rebutted at trial. The "anti-pooling" theory relies on "making silence advantageous to guilty suspects,"²⁰⁴ thereby inducing more guilty suspects to claim it. Seidmann and Stein claim that its costs are minimal because those who choose silence would not make damaging statements were the right not available.²⁰⁵ The authors undoubtedly are correct in their contention that convincing fabrications can harm the innocent.²⁰⁶ As noted earlier, however, their argument that the right to silence alters the conduct of only those who would fabricate convincingly is itself unconvincing. The authors apparently agree with experienced criminal attorneys that suspects who now waive the right to silence often make "the worst possible move" by either confessing or fabricating an account susceptible of refutation.²⁰⁷ Because most guilty suspects who now speak to the police do not do so effectively, it is highly unlikely that, if more choose speaking over silence, they will be either less prone to confess or more effective in their fabrications. Thus, the right to silence has considerable costs in terms of fewer confessions and fewer false statements which can be investigated and rebutted at trial.²⁰⁸ This is a significant consequence given the fact that studies have estimated that

203. Seidmann and Stein recognize that clear benefits flow from confessions and that the confession rate is always a hard fact. *Id.* at 437.

204. *Id.* at 438.

205. See *id.* at 499 (arguing that defendants facing evidence of moderate or intermediate strength generally would choose to lie rather than to confess if the right were not available).

206. See *infra* notes 210-11 and accompanying text.

207. See Seidmann & Stein, *supra* note 18, at 464.

208. See *id.* at 444 (noting that either silence or false responses in the face of criminal accusation usually signals guilt).

confessions are necessary to convict in approximately twenty percent of criminal cases.²⁰⁹

2. *Helping the Innocent by Choosing to Speak.*—In a number of ways innocent people benefit directly by guilty suspects either confessing or lying ineffectively. The “anti-pooling” theory focuses on benefits only in the sense of innocent suspects avoiding unjust convictions, but the innocent may enjoy other benefits through fewer criminals escaping conviction. Confessions and damaging statements induce the guilty to plea bargain, which avoids the need for witnesses and victims to endure the trauma of a lengthy trial process. Also, damaging statements, which result in convictions of the guilty, may eliminate future crimes that would have been committed by guilty beneficiaries of the right to silence.

Finally, lost confessions may harm innocent people who are erroneously charged and prosecuted, but who would have been cleared by the truthful statements of the guilty.²¹⁰ In such cases, speaking can have strong “anti-pooling” effects which are highly beneficial to innocent suspects. The more the guilty remain silent, the less they separate themselves from the innocent through confessions and refutable fabrications. If more innocent suspects are released and innocent defendants acquitted as the result of guilty suspects speaking and incriminating themselves, encouraging more to do so by restricting the right to silence might result in a net benefit for the innocent in the form of avoiding incarceration for crimes they did not commit.

Thus, one might ask how the innocent view the right to silence. Seidmann and Stein propose a “non-smoker-smoke-lover” analogy to support the view that innocent suspects would prefer the guilty to exercise the right to silence even though they have no need for it. The non-smoker who likes the smell of smoke, they believe, would reject an offer of a cigarette but would not favor a ban on smoking.²¹¹ For her, the smoking of others is beneficial, while her own smoking is not. Innocent suspects, like the passive smoker, would, by analogy, oppose elimination of the right to silence, although they do not choose to exercise it.²¹² However, in light of the many ways innocent individuals benefit from guilty suspects speaking and incriminating themselves, would the innocent really object to limitations on the right to silence, when none exercise it, merely on the ground

209. Paul Cassell’s extensive review of American studies found that the percentage of confessions which are necessary to convict varied widely, but averaged 23.8% of all cases and 26.1% of confession cases. See Cassell, *supra* note 92, at 433. Stephen Schulhofer estimated the necessity rate of confessions to be around nineteen percent. See Schulhofer, *supra* note 93, at 545 & tbl.2. My own review of evaluation studies found that the percentage of cases in which a statement was regarded as necessary for conviction varied from three percent to twenty-eight percent, with most recent scholarly studies finding statements necessary in about twenty percent of the cases. See Van Kessel, *supra* note 92, at 127-28.

210. See Cassell, *Protecting the Innocent*, *supra* note 35, at 500-01 (contending that the innocent are at risk not only from false confessions, but also from lost truthful confessions which prevent police from solving crimes.)

211. See Seidmann & Stein, *supra* note 18, at 457-58.

212. *Id.* at 458.

that marginally fewer guilty people would lie? They reasonably might assume that, just as second-hand smoke can be harmful to the “innocent” non-smoker, so can second-hand silence harm the innocent defendant.

In sum, by confessing or by fabricating in an unconvincing way, the guilty help witnesses, victims (both former and prospective), and innocent defendants, but it stretches the imagination to believe that they perform an even more important social good by merely clamming up.

III. IMPLICATIONS OF THE “ANTI-Pooling” THEORY REGARDING REFORM OF THE RIGHT TO SILENCE

A. *The Many Faces of the Right to Silence*

Seidmann and Stein advocate retaining the right to silence as we have it with respect to the prohibition on drawing adverse inferences from silence during pretrial questioning, trial, and sentencing, based on the proposition that the innocent, as well as the guilty, benefit from the right both as a refuge during pretrial questioning and as a viable alternative to perjury at trial.²¹³ Referring to Bentham and other critics of the right to silence, who would abolish the rule against drawing adverse inferences from silence, the authors regard the “key question” to be whether the “abolitionist proposal is good or bad.”²¹⁴ They conclude that it would be preferable to encourage potential fabricators to remain silent by giving them the right to do so “without sustaining punishment or adverse inferences.”²¹⁵

At present, however, abolition of the rule against adverse inferences is not a realistic possibility in America, particularly at the trial and sentencing stages.²¹⁶ Nor would it be just to permit adverse inferences from silence at trial, given our present rules of evidence and procedure. To permit an inference of guilt from the failure to take the stand, when evidentiary rules strongly inhibit even innocent defendants from testifying, would not only be unfair, it would be inimical to truth discovery. In any event, the no-adverse-inference principle is so imbedded in our

213. See *id.* at 453-54 n.79, 473, 494; see also *id.* at 440 (discussing two branches of the right to silence—the evidentiary rule against adverse inferences from its exercise and the “contempt exemption,” which gives one a privilege to refuse to testify if answers might contribute to criminal conviction, and stating that Seidmann and Stein would focus only on the former).

214. *Id.* at 433.

215. *Id.* at 461.

216. See *supra* notes 6-9 and accompanying text, noting that *Griffin* was strongly reaffirmed in *Mitchell* and that *Miranda* was reaffirmed in *Dickerson*. The possibility remains of modifying *Miranda* warnings to eliminate any implicit promise of a safe harbor in silence, but the Supreme Court has given no indication that it would be willing to treat pretrial silence differently from trial silence. The Court recently stated that “there might be reason to reconsider *Doyle*,” but acknowledged that “[i]t is possible to believe that [the caution] contained an implicit promise that [the defendant’s] choice of the option of silence would *not* be used against him.” *Portuondo v. Agard*, 529 U.S. 61, 74-75 (2000).

culture and jurisprudence that following the English approach is not a realistic option.²¹⁷

By concentrating on discrediting Bentham's proposal to permit adverse inferences, Seidmann and Stein neglect other significant aspects of the right.²¹⁸ Particularly in the pretrial interrogation context, the protection against adverse inferences arguably is not the most important protection. In the real world of criminal investigation, the right to silence may be regarded as encompassing all legal rules which significantly encourage suspects to remain silent. These include advice of the right to counsel and the prohibition on further questioning once a suspect expresses the desire to speak with a lawyer. Elimination of these protections might be more significant than the abolition of the no-adverse-inference rule. Likewise, the enactment of a more powerful right to counsel during police questioning, which prohibits police interrogation outside counsel's presence, likely would have far greater consequences than does the present prohibition on the jury learning of, or drawing of adverse inferences from, a suspect's refusal to waive *Miranda* rights.

Seidmann and Stein seem to support *Miranda* jurisprudence, which goes far beyond simple prohibitions on adverse inferences, providing a right to counsel during custodial questioning, and a complex system of warning and waiver standards.²¹⁹ Elimination of *Miranda*'s warning requirements is highly unlikely, in light of the Supreme Court's affirmation of *Miranda* as constitutionally based. However, the form and parameters of *Miranda*'s warning requirements are constantly being adjusted, as are associated guarantees, such as the Sixth

217. See *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (holding that *Miranda* is constitutionally based and stating that "[p]rinciples once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition"). Even judges critical of *Miranda* and the right to silence have balked at the prospect of abandoning *Griffin* and allowing defendants' trial silence to support an inference of guilt. While the dissenters in *Mitchell* criticized *Griffin* as a "breathtaking act of sorcery . . . [transforming] legislative policy into constitutional command," *id.* at 336 (Scalia, J., dissenting), only Justice Thomas urged reexamining *Griffin* at this point. See *id.* at 341-42 (Thomas, J., dissenting). Justice Scalia, no fan of *Griffin*, remarked recently, "[T]he inference of guilt from silence [at trial] is not always 'natural or irresistible.'" *Portuondo*, 529 U.S. at 67. For instance, "[a] defendant might refuse to testify simply out of fear that he will be made to look bad by clever counsel, or fear 'that his prior convictions will prejudice the jury.'" *Id.* (quoting *People v. Modesto*, 398 P.2d 753, 763 (1965)).

218. See Seidmann & Stein, *supra* note 18, at 433, 446-47, 450. Seidmann and Stein's analysis focuses on "whether the right to silence (in the form of immunity against adverse inferences, properly enforced) is available or not." *Id.* at 464.

219. See *id.* at 498-500 (examining the effect of *Miranda* on confession and conviction rates and suggesting that *Miranda* studies, which show that it "significantly reduced the clearance rate," are consistent with the theory that the right to silence does have costs in terms of declining conviction rates). See also *id.* at 503-04 (suggesting that a repeal of *Miranda* "would increase the conviction rate among both guilty and innocent defendants, without significantly affecting the confession rate").

Amendment right to counsel, which comes into play only after formal accusation but applies regardless of formal interrogation²²⁰ and the due process voluntariness rule which applies to all contexts involving coercion.²²¹ Thus, the most important questions today concern whether various aspects of the right to silence should be either expanded or contracted. In this respect the "anti-pooling" theory points in directions which have important, but quite different, implications for the scope of the many faces of the right to silence.

B. Enhancing the Right to Silence

First, the "anti-pooling" theory strongly suggests that the right to silence, which currently is claimed at the pretrial stage by only a minority of defendants,²²² should be expanded and made even more attractive to guilty suspects. The more the guilty remain silent, the greater the "anti-pooling" effect and the more benefits flow to the innocent. As Seidmann and Stein put it, because the innocent must compete with the guilty in this enterprise, measures should be adopted which "drive false statements out of the market."²²³ In the authors' ideal world, the right to silence would be so attractive that the guilty would separate from the innocent by exercising the right, and the jury would draw "a favorable inference from any exculpatory statement" resulting in the acquittal of innocents, "who alone make such statements."²²⁴ In short, no lemon seller would make false claims, and apple sellers always would be believed. Thus, the logic of "anti-pooling" suggests expanding the right to silence to make it even more appealing to the guilty, such that they will virtually always exercise it.

Full effectuation of "anti-pooling" benefits to the innocent, through exercise of the right to silence by guilty fabricators, would entail elimination of all false statements by guilty suspects and defendants. Because it is not possible to accurately separate all false claims from true exculpatory statements,²²⁵ we would

220. See *Michigan v. Jackson*, 475 U.S. 625, 626 (1986) (holding that the Sixth Amendment embodies the *Miranda-Edwards* rule, such that a defendant's request for appointment of counsel at arraignment prevents police from initiating interrogation about the charged offense); *Texas v. Cobb*, 532 U.S. 162, 164 (2001) (holding that the Sixth Amendment right to counsel is "offense specific" and does not apply to uncharged offenses that are "closely related factually" or "factually interwoven" with the charged crime, unless they are "the same offense" under double jeopardy standards).

221. See *Colorado v. Connelly*, 479 U.S. 157 (1986) (holding that coercive police activity is a necessary predicate of finding both an involuntary confession under due process and an involuntary waiver of *Miranda* rights).

222. See Seidmann & Stein, *supra* note 18, at 448 (stating that "suspects do not exercise the right to silence very often either at interrogation or at trial").

223. *Id.* at 460.

224. *Id.* at 469.

225. Threatening extreme sanctions, such as the death penalty, for all fabrications also might drive lies from the market, but many true statements also would be lost.

have to exclude all claims of innocence, whether in the form of extrajudicial statements or trial testimony.²²⁶ Those suspected of or charged with crimes could only speak if they were willing to confess. In the pretrial context, a prohibition on all police questioning of suspects would come close to accomplishing the same objective, as would a requirement that counsel consent to all police questioning, although some suspects undoubtedly would assert their claims of innocence without being questioned.

Seidmann and Stein do not advocate such extreme measures but instead concentrate on the retention of existing right to silence principles, particularly the rule against adverse inferences and *Miranda* jurisprudence.²²⁷ However, their theory does suggest the expansion of rules which would increase the attractiveness of silence, at least to guilty fabricators, whose lies are the main source of the "pooling" problem. Thus, the "anti-pooling" theory may be seen as another reason for both accepting the arguments of those advocating the enlargement of procedural rights during police interrogations²²⁸ and rejecting arguments to alter right to silence rules to encourage suspects to make voluntary statements and defendants to testify in court.²²⁹ Implications of the "anti-pooling" theory regarding an even more protective right to silence are of considerable significance.²³⁰

Expansion of the right to silence at the pretrial stage might involve the bolstering of *Miranda*'s warning and waiver standards and the adoption of measures that increase the "rational use" of the right to silence, which the guilty

226. Of course, rules preventing the defendant from testifying would be unconstitutional. See *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (holding that an automatic rule limiting defendant's testimony to matters recalled and related prior to hypnosis is unconstitutional and stating that the right to testify is "essential to due process of law in a fair adversary process" and "basic in our system of jurisprudence").

227. See Seidmann & Stein, *supra* note 18, at 440. Seidmann and Stein analyze the right to silence as having two branches—the evidentiary rule against adverse influences from its exercise and the "contempt exemption" which gives one a privilege to refuse to testify if answers might contribute to criminal conviction. They note that their analysis will focus only on the former aspect. They also cite studies concerning the effect of *Miranda* and attack those who seek to eliminate *Miranda*'s warning and waiver standards. See *id.* at 498-500, 503.

228. See, e.g., Leo & Ofshe, *supra* note 35; Leo & Ofshe, *Consequences of False Confessions*, *supra* note 35; Leo & Ofshe, *Scapecoat*, *supra* note 35; see also Jackson, *supra* note 176 (advocating greater equality and fairness during police interviews by adoption of formalized, adversary-style procedures including clear guidelines on disclosure of police evidence and a requirement that those refusing ordinary legal advice be referred to the judge for appointment of a legal advisor who would advise the suspect "on behalf of the court").

229. See, e.g., AMAR, *supra* note 40; Cassell, *Balanced Approaches*, *supra* note 35; Cassell, *Wrongful Conviction*, *supra* note 35.

230. Of course, liars will always be with us. Even with a substantial right to silence, there will never be a time when only the innocent will claim innocence, or when lemon-sellers will stop praising their cars. The reality is that we must live with uncertainty regarding the validity of exonerating statements.

generally do not claim, although it is in their best interest to do so. For example, *Miranda* warnings might include an explicit "safe harbor" promise that the suspect's silence will not be known to the jury whether or not he later testifies.²³¹ Furthermore, in light of the "strong correlation" between the exercise of the silence right and representation by counsel,²³² measures could be adopted that would encourage more suspects to request legal advice. If the goal is to induce guilty suspects to act rationally,²³³ the best means would be to give them counsel, whose primary interest is in protecting their clients from conviction. For example, *Miranda* waivers could be held invalid unless explicit, which would require asking of indigent suspects whether they would like counsel appointed to advise them during questioning.²³⁴ Waiver of *Miranda* rights might be deemed invalid in the absence of counsel, thereby requiring the presence of counsel at every interrogation, whether or not requested by the suspect.²³⁵ Finally, rules might require disclosure of all evidence in the hands of the authorities prior to any questioning and prohibit all deceptions, including any suggestion that the incriminating evidence in the hands of the police is stronger than it actually is.²³⁶

231. The promise is not a part of required *Miranda* warnings, although it is regarded as implicit in them. See *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (stating that, while "*Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings" and holding that the use for impeachment purposes violates due process).

232. See Seidmann & Stein, *supra* note 18, at 465.

233. Seidmann and Stein rely on the assumption that, in the rational pursuit of exoneration, the guilty will refrain from "pooling" by exercising the right to silence if it appears in their interest to remain silent rather than to lie. See *id.* at 448.

234. Currently, an express waiver of the right to counsel is not required, but may be implied from the circumstances. See *North Carolina v. Butler*, 441 U.S. 369, 370 (1979) (rejecting a *per se* rule that a suspect must be shown to have "explicitly waived the right to the presence of a lawyer").

235. Presently, *Miranda* and its progeny do not require the actual presence of stationhouse lawyers. See *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (rejecting the notion "that each police station must have a 'station house lawyer' present at all times to advise prisoners"). Nor do defendants have the right to see a lawyer on request unless interrogated. See *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986) (finding that *Miranda* rights had been waived despite the fact that the defendant had not been informed that counsel purporting to represent him had called police and requested that no questioning take place and that the police had assured counsel that the defendant would not be questioned); *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that *Miranda* does not require that lawyers be producible on call, but only that a suspect be informed that he has the right to counsel before and during questioning and that a lawyer will be appointed for him if he could not afford one). Thus, "[i]f the police cannot provide appointed counsel, *Miranda* requires only that police not question a suspect. . . ." *Id.* at 204.

236. The Supreme Court generally has tolerated police trickery and has done little to curb its use by excluding evidence. See WAYNE R. LAFAYE & JOSEPH H. ISRAEL, *CRIMINAL PROCEDURE* § 6.1(a)-(c) (1985); see also *Moran*, 475 U.S. at 423, 435 (viewing the deliberate misleading of defendant's lawyer by the police as "highly inappropriate" and "distasteful," but holding that such

1. *The Consequences of an Expanded Right to Silence*.—Expanding the right to silence at the pretrial interrogation stage, by rules designed to increase the “rational use” of the right, would lead to even more serious pooling problems, as well as to the release of more guilty defendants. Such rules would cause both greater use of silence by guilty suspects, who otherwise would make damaging statements, and more uncontradictable fabrications, which would pool with the true claims of innocents. Seidmann and Stein contend that the right to silence is used only by those who otherwise would fabricate; that is, the right causes the guilty to switch from lies to silence, but not from truth (confessions) to silence.²³⁷ I have argued that there are strong reasons to be skeptical of this assumption, but even if valid with respect to the rule against adverse inferences, it does not hold water with respect to those aspects of the right which would encourage suspects to exercise the right more rationally, such as preventing police deception, or increasing access to counsel and knowledge of the prosecution’s evidence.

2. *Enhancing the Right to Counsel*.—Expanding rules which promote the rational use of the right to silence, through the presence and advice of counsel, would result in a drastic reduction in statements to police, including both confessions and damaging denials. Competent lawyers know that, in our system of justice, confessing to the police without a plea agreement, or similar arrangement garnering an advantage,²³⁸ severely damages a defendant’s case. As supporters of *Miranda* point out, “[a]lthough confession may be good for the soul, it is lousy for the defense.”²³⁹ Furthermore, defense lawyers recognize that even claims of innocence or explanations of suspicious conduct can have damaging consequences.²⁴⁰

In Europe and England, the presence of counsel is not usually a significant barrier to pretrial questioning, but here it is. Only in rare cases will competent American counsel advise their clients to speak to police. For example, counsel

deception is irrelevant to the waiver issue when the suspect is unaware of it); *Colorado v. Spring*, 479 U.S. 564, 576 n.8 (1987) (holding that police have no obligation to advise a suspect of the crime concerning which they wish to question him, but leaving unresolved the question whether a *Miranda* waiver would be valid had there been “an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation”). For a rare case in which police trickery resulted in the exclusion of a confession, see *State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (excluding a confession obtained after police told the accused that they already had sufficient evidence to convict him).

237. See Seidmann & Stein, *supra* note 18, at 470 (stating that suspects who would confess “would not switch to silence were [it] to become privileged”).

238. For example, a defendant may seek to avoid statutory mandatory sentencing minimums by offering substantial assistance under U.S.S.G. § 5K1.1 (2001).

239. Weisselberg, *supra* note 7, at 154. Weisselberg agrees with Richard Leo that “all approaches to the analysis of human behavior that presume rationality would, if applied superficially, classify confession as an irrational act.” *Id.* at 154 n.226 (quoting Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 *STUD. L. PROB. & SOC’Y* 189, 194 (1997)).

240. See *supra* note 76 and accompanying text.

might deem it to be in the defendant's interest to speak to police if she firmly believes that the client is factually innocent and that his honest claims will convince authorities of his non-involvement.²⁴¹ Also, counsel may find a confession advantageous, where the prosecution's evidence is so overwhelming that the client has nothing to lose, and maybe something to gain, by giving a full statement.²⁴² Yet, in cases where the prosecution's evidence is very strong, Seidmann and Stein believe that suspects usually will confess even without a right to silence.²⁴³

It is in weak or marginal cases, when the police have probable cause to arrest

241. Even then, most defense lawyers would hesitate unless their clients' claims of innocence first were verified, such that it was reasonably certain that the statements would not be used against them. For a recent case involving the unusual situation in which a lawyer granted permission for his client to speak with the police, see *Texas v. Cobb*, 532 U.S. 162 (2001). While under arrest, defendant had confessed to committing an unrelated home burglary, but denied knowledge of the disappearance of the residents. Following his indictment for the burglary, his counsel gave police permission to question him concerning the disappearances and he denied any involvement. Counsel most likely believed that his client was not guilty and would provide a convincing account, which he apparently did, as he was neither arrested nor charged with the murder of the residents, but instead released on bond during the pendency of the burglary case. See *id.* at 165. Certainly, competent counsel would not have granted permission for the interview had she believed that her client would either confess or give an unconvincing or incriminating story.

While out on bond, the defendant confessed to his father that he had killed the residents. After his father told the police of the confession, the police arrested the defendant and, without seeking his lawyer's permission, questioned him after reciting *Miranda* warnings and procuring a waiver, whereupon he confessed to the murders. The Court held that the police did not have to first ask for counsel's permission because the Sixth Amendment right to counsel is "offense specific," *id.* at 178, and did not apply to the uncharged murder offenses although they may have been "closely related factually," *id.* at 186, or "inextricably intertwined with" the burglary charge. *Id.* at 173. The Court did not discuss what counsel would do if called by the police and asked for permission after learning of defendant's confession to his father. The concurring justices, however, assumed that counsel would object which would deny defendant "the choice to speak," whereas the dissenters implied that police would have received counsel's permission.

242. The Sentencing Guidelines applicable to federal cases provide that a defendant is entitled to a reduction for acceptance of responsibility if he "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a) (2001). But for this purpose, the confession does not have to be made to the police; it can come after the defense has obtained discovery and fully assessed the strength of the prosecution's case. However, admitting guilt only after a verdict of guilty usually will not suffice and a guilty plea alone does not give a defendant an automatic right to the downward departure. See *id.* § 3E1.1(a), app. n.2 & 3.

243. Seidmann and Stein believe that if the incriminating evidence is "sufficiently strong," the right to silence "becomes irrelevant to behavior" since the guilty always will prefer "to confess and enjoy the small but positive remission of sentence." Seidmann & Stein, *supra* note 18, at 469. Apparently, Seidmann and Stein ignore or discount the many "dead cases" well known to career defense attorneys in which guilty defendants prefer going to trial rather than confessing or accepting a plea bargain.

but not enough evidence to convict, that, by increasing the rational use of the right to remain silent, the presence and advice of counsel would have the greatest effect. In such cases only the most incompetent counsel would advise a suspect to talk to the police.²⁴⁴ In cases where evidence of guilt is weak, even generally less aggressive English lawyers often will advise silence despite the possibility of adverse inferences.²⁴⁵ Consequently, increasing the involvement of counsel during police interrogation would tend to eliminate confessions and other damaging statements in all but the most unusual cases, and would be particularly harmful to accurate factfinding in cases where police do not have strong evidence of guilt. And these are the cases in which confessions are most needed to convict the guilty and where, according to Seidmann and Stein, exercise of the right to silence helps only the guilty.²⁴⁶

Our real dilemma, as posed by Justice Jackson over fifty years ago, is that “[t]o subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom.”²⁴⁷ However,

[t]o bring in a lawyer means a real peril to solution of the crime because, under our adversary system [a lawyer] owes no duty whatever to help society solve its crime [and] . . . any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.²⁴⁸

Since Justice Jackson wrote these words, our Supreme Court has developed a complex body of constitutional protections for those subjected to interrogation and various states have enacted or are considering further protections, such as time limits and recording requirements.²⁴⁹ But it remains true today, as it was then, that bringing a lawyer into an interrogation virtually guarantees its termination.

3. *Limiting Deception and Requiring Disclosure of Police Evidence.*—Rules that require early disclosure of prosecution evidence or which prohibit

244. See *People v. Claudio*, 629 N.E.2d 384, 385 (N.Y. 1993) (stating that the court has “accept[ed] the premise, which was shared by every court that has considered this case, that retained counsel’s conduct in advising defendant to confess to the police—at a time when there was no concrete evidence against him and no possibility of a plea offer—represented gross professional incompetence”); compare *People v. Smith*, 451 N.E.2d 157 (N.Y. 1983) (holding that counsel was not incompetent by agreeing to defendant’s meeting with the police in light of the fact that the prosecution’s case was overwhelming and that it was reasonable for counsel to believe that defendant had nothing to lose by speaking to the authorities and cooperation might result in a favorable plea bargain).

245. See *supra* notes 131-32 and accompanying text.

246. Seidmann & Stein, *supra* note 18, at 468-70.

247. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting).

248. *Id.*

249. See, e.g., Peter Erlinger, *Getting Serious About Miranda in Minnesota: Criminal and Civil Sanctions for Failure to Respond to Requests for Counsel*, 27 WM. MITCHELL L. REV. 941, 943-44 (2000) (noting Minnesota’s constitutional requirement that confessions be recorded).

deceptions, such as false statements of the strength of incriminating evidence, also would tend to reduce confessions and easily refuted false claims of innocence. All who have studied police interrogation know the importance of the suspect's unawareness of the evidence possessed by the police. As Seidmann and Stein recognize, the interrogation "game disadvantages the guilty suspect [who] must bluff in order to signal innocence, but . . . [i]n order to bluff successfully, the guilty suspect must be aware of the cards that the police hold."²⁵⁰ Seidmann and Stein conclude that under "stressful interrogation" and with "asymmetric information," "guilty suspects often choose the worst possible move, which brings about the worst possible outcome."²⁵¹ However, this "worst move" for the guilty is usually best for the innocent and for society because it operates to separate the guilty from the innocent and leads to more accurate factfinding. Thus, the authors appear to concede that deception is an effective technique for discovering the truth and for leading the guilty to separate themselves from the innocent. They state that the "typical suspect confesses . . . only when confronted with evidence that he believes to be irrefutable or when offered a tempting deal by the police or the prosecution."²⁵²

The availability of deception is particularly important in marginal cases, in which police have strong suspicions of a defendant's guilt but not enough evidence to persuade a jury beyond a reasonable doubt. These are the very cases in which confessions are most needed to convict the guilty and where, according to the "anti-pooling" theory, the exercise of the right to silence does not benefit the innocent but merely helps the guilty avoid conviction.²⁵³

A barrage of scholarly criticism has been leveled at the lenient attitude of American courts toward police deception.²⁵⁴ Professors Ofshe and Leo complain that police manipulate a suspect's perception of his situation with the purpose of leading him to conclude that confessing is a rational and appropriate response.²⁵⁵

250. Seidmann & Stein, *supra* note 18, at 443.

251. *Id.* at 464. Seidmann and Stein assume that the police are not obligated to familiarize suspects with incriminating evidence and that suspects usually have no information about evidence possessed by the police. *Id.* at 443-44.

252. *Id.* at 450-51. In fact, Seidmann and Stein assume that guilty suspects will confess "if, and only if, the evidence against them is strong." *Id.* at 499-500.

253. *See id.* at 468-70.

254. *See, e.g.,* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997); Charles E. Glennon & Tayebe Shah-Mirani, *Illinois v. Perkins: Approving the Use of Police Trickery in Prison to Circumvent Miranda*, 21 LOY. U. CHI. L. J. 811 (1990); Ofshe & Leo, *Decision to Confess*, *supra* note 35, at 979; Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL. & SOC'Y 189 (1997); Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593 (1988); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); Welsh White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996).

255. *See* Ofshe & Leo, *Decision to Confess*, *supra* note 35, at 1114-15 (contending that

Professor Alschuler also contends that the Constitution should prohibit police from engaging in deceptive practices such as falsifying incriminating evidence or misrepresenting the strength of evidence against a defendant.²⁵⁶ But let's be realistic. If confessing to police in contexts other than plea bargaining, offers little or no advantage to a suspect and risks severely damaging his case, in order to induce guilty suspects to tell the truth, police must deceive them by some means, and one such means is to convince them either that the evidence is so strong that denials are useless or that confessing might offer some advantage. Because the act of confessing in today's justice system ultimately is damaging to a defendant and, in that sense, highly irrational, modern police interrogation must be a confidence game if it is to be an effective means of determining the truth.

In sum, enlarging the right to silence by adopting rules that encourage more guilty people to claim the right to remain silent most likely would lead to unhealthy consequences, including even greater "pooling" in ways that would not only harm innocent defendants but help more guilty defendants avoid conviction. Some Europeans advocate greater equality and fairness during police interviews, including the adoption of formalized, adversary-style procedures involving full disclosure of police evidence and court-appointed legal advisors such that all suspects are fully informed as to whether it is in their interest to cooperate.²⁵⁷ Under American rules, however, requiring disclosure of prosecution evidence and prohibiting deception, especially when combined with the assistance of counsel, are inimical to the discovery of truth when applied to pretrial interrogation.

While on its face the "anti-pooling" theory seems to favor an expanded right to silence, the assumptions underlying the theory show that increasing the rational use of the right to silence actually may lead to fewer confessions and

police manipulating often leads to unreliable confessions); see also Leo & Ofshe, *Consequences of False Confessions*, *supra* note 35, at 492 (attributing false confessions to poor police training, particularly to the reliance on manuals that teach police to use tactics "that have been shown to be coercive and to produce false confessions").

Professor Paul Cassell has vigorously criticized the contention that false confessions are pervasive or that they occur frequently. See Cassell, *Balanced Approaches*, *supra* note 35, at 1123-26; Cassell, *Protecting the Innocent*, *supra* note 35, at 497; Cassell, *Wrongful Conviction*, *supra* note 35, at 523. For a "final" response to Professor Cassell, see Leo & Ofshe, *Scapegoat*, *supra* note 35, at 557.

256. See Alschuler, *supra* note 254, at 974.

257. See R. J. Toney, *Disclosure of Evidence and Legal Assistance at Custodial Interrogation: What does the European Convention on Human Rights Require?*, 5 E & P 39, 53-54 (2001) (arguing that lack of clear guidance on police disclosure violates the equality of arms principle of Article 6 of the European Convention); Jackson, *supra* note 176, at 172 (advocating judicially appointed lawyers who would advise suspects "on behalf of the court" such that "[f]rom the beginning of the interview suspects would be given an appraisal of how much information there was against them and would be given a much more informed choice as to whether it was in their interest to cooperate with the proceedings").

rebuttable statements and thus to an even greater "pooling" effect and even more harm to the innocent. Consequently, Seidmann and Stein's analysis suggests good reason to be skeptical of proposals that would either expand the right to silence in the pretrial context or otherwise formalize the interrogation process by means of lawyers armed with knowledge of police evidence and sworn to use all legal means to prevent the prosecution from proving its case beyond a reasonable doubt.

C. Restricting the Right to Silence

With respect to the possibility of a significantly reduced right to silence, the implications of the "anti-pooling" theory remain intriguing. Seidmann and Stein suggest that, when the "anti-pooling" rationale does not apply, there is no valid reason to protect against adverse inferences from the defendant's silence.²⁵⁸ This raises an interesting implication of the "anti-pooling" theory which undercuts the right to silence in significant ways. The theory posits that, if the guilty "cannot fabricate evidence in a way that harms the innocent, then they should not be exempted from potential self-incrimination," and that "[o]nly the existence of a meaningful fabrication alternative should therefore activate the privilege."²⁵⁹ But because the right to silence helps innocent suspects only when the incriminating evidence is "of intermediate strength,"²⁶⁰ the privilege should offer no protection whenever the evidence against a suspect is either very weak or very strong. Furthermore, the theory suggests that the right to silence should protect only those who can lie effectively. Those who might confess anyway or who lack the ability or factual context that would enable them to lie convincingly (and imitate the innocent), should not be able to claim the privilege. If the rule were applied individually, rather than categorically, any person who had no believable story to tell would be unprotected by the privilege. This approach, of course, would amount to a radical, unworkable, and clearly unacceptable revision of the right to silence and privilege against self-incrimination.

D. Recognizing the Harm Caused by Uncontradictable Lies and the Importance of Unrehearsed Statements

Critics of *Miranda* usually concentrate on the decision's effect on the confession rate. The "anti-pooling" theory is helpful in focusing attention on the consequences of statements other than confessions. Moreover, the "anti-pooling" theory demonstrates the importance of distinguishing between true and false claims of innocence, and between effective fabrications and those which can be easily rebutted and used to further accurate factfinding. Seidmann and Stein's

258. See Seidmann & Stein, *supra* note 18, at 480. Nor do Seidmann and Stein believe that the innocent need protection from adverse inferences based upon failure to testify, notwithstanding the argument that many innocent defendants may remain silent out of fear of prior conviction impeachment. See *id.* at 494.

259. *Id.* at 480.

260. *Id.* at 461-62.

analysis is particularly beneficial in pointing out the harm caused by convincing fabrications and the need to avoid rules which facilitate the manufacture of such statements—that is, those procedures which might help the guilty to create convincing and uncontradictable fabrications.

There is no disputing that, as Seidmann and Stein claim, lies can hurt and it is important to minimize false statements that are not susceptible of refutation. However, their focus is a bit narrow. They concentrate on the harm to the innocent caused by the “pooling” effect caused by “the ability to tell uncontradicted lies,”²⁶¹ on the ground that, the more the guilty lie, the less likely it is that factfinders will believe true claims of innocence. But convincing fabrications can frustrate accurate factfinding in more important ways than the general “pooling” effect in the marketplace of exonerating statements. False statements of innocence, which are plausible and not subject to effective contradiction, may not only lead to the release of the guilty; they may contribute to the arrest and conviction of the innocent by “specific pooling” (the creation of case-specific factual conflicts). This effect is more directly detrimental to accuracy than the marginally diminished credence given to statements by innocents due to the fact that a few more guilty people lie. A false but unrefutable denial may lead the police on “wild goose chases,” wasting resources and endangering others who may be wrongly accused. On the other hand, a suspect who refuses to speak gives the police good reason to believe that they have the right person. Even more damaging are statements falsely identifying another person as the perpetrator or claiming that another was the main actor. An accomplice to a crime may give false testimony, in the hope of a reduced sentence, which incriminates one who is either innocent or not as culpable as claimed. Furthermore, an accomplice’s confession to the police, which is both self-incriminatory and falsely accusatory, may be admitted into evidence despite the lack of any opportunity of the one falsely accused to cross-examine the declarant-accomplice.²⁶² In these cases, the innocent would be better off had the suspect remained silent.

Furthermore, the “anti-pooling” theory is helpful in emphasizing the importance of unrehearsed statements, that is, the suspect’s story before he or she

261. *Id.* at 480.

262. While the Confrontation Clause and hearsay rules may bar admission of blame-shifting statements to the police, the Supreme Court has left the door open to admission of out-of-court statements by unavailable declarants, which merely share culpability with others. *See Williamson v. United States*, 512 U.S. 594, 599 (1994) (holding that the against-penal-interest exception of FRE 804(b)(3) covers “only those declarations or remarks within the confession that are individually self-inculpatory”); *see also Lilly v. Virginia*, 527 U.S. 116 (1999) (holding that the Sixth Amendment’s confrontation right is violated by admission of a nontestifying accomplice’s entire confession that contains some statements against the accomplice’s penal interest and others that inculcate defendant, but leaving open the possibility of admitting only those parts of accomplice statements that equally inculcate both the accomplice and the defendant, as well as those accusatory statements made outside the context of police questioning in anticipation of prosecution).

has an opportunity to learn about the prosecution's case, consider what might be an acceptable defense, and contrive a reasonable but false response. However, such statements also are important to the defendant, and their admissibility should be a two-way street, which freely admits defendant's claims of innocence whether offered by the prosecution or the defendant. Defendant's exonerating statements, made in the immediate course of critical events, such as arrest or confrontation with incriminating evidence, which are significant and not the product of lawyer advocacy should be admissible when offered on a defendant's behalf. For example, evidence of a defendant's denial when confronted with contraband in the immediate circumstances of its discovery, which often is not admitted as an excited utterance,²⁶³ should be admitted on the defendant's behalf, at least as long as the defendant takes the stand and does not use the statement as a substitute for his own in-court testimony.²⁶⁴

263. See, e.g., *United States v. Sewell*, 90 F.3d 326, 327 (8th Cir. 1996) (affirming the trial court's exclusion of defendant's statement denying knowledge of the presence of a gun found in the trunk of his car, which was uttered immediately following its discovery, on the ground that there was not a sufficient showing of stress which "stills the reflective faculties").

264. Because the defendant is an available witness only to the defense, if the defendant could freely introduce his or her own prior exonerating statements, particularly those prepared and packaged by defense counsel, the defense could quite easily introduce defendant's personal story untested by cross-examination. Thus, we are faced with conflicting interests—the defendant's interest in presenting his or her own "transactional" statements made during critical events, which often have significant probative value, and the prosecution's interest in avoiding the presentation of a fabricated defense which cannot be tested by cross-examination. An adversary-oriented accommodation of these interests would lead to admission of such statements provided that they are not used as a substitute for the defendant's trial testimony. See Van Kessel, *supra* note 196, at 540-41.

In *Sewell*, the defendant took the stand in his own defense, so the purpose of deterring defendants from "testimonial substitution" was not served by excluding the statement. See *Sewell*, 90 F.3d at 326. A rule admitting as non-hearsay a defendant's prior consistent statements, when helpful in evaluating the defendant's credibility as a witness, would serve this purpose if limited to transactional-type statements, as opposed to lawyer-created or packaged denials. See, e.g., MINN. STAT. ANN. § 50, Rule 801(d)(1)(B) (Michie 1989 & Supp. 2001).

Consider the highly publicized road rage case involving Leo, the white bichon frise. See Nieves, *supra* note 85, at A12. Following a fender-bender in San Jose, California, one of the drivers became enraged, reached into the other car, pulled out the owner's small dog, Leo, and hurled him into traffic where he was struck and killed. *Id.* Witnesses were available to testify to defendant's conduct but at his trial for animal cruelty, his lawyer said the defendant would testify that the dog bit him and he involuntarily jerked back causing the dog to be thrown onto the road. *Id.* (not a bad story in response to a very strong prosecution case). But did the defendant give the same account to witnesses at the scene or to the police upon his arrest, or did he remain silent and come up with the story for the first time at trial? If he had given the same statement in a "transactional-type" context, it would have been very helpful, whereas his remaining silent would have been highly probative of guilt. Yet, under today's rules, ordinarily a defendant may not introduce his prior statement and the prosecution may not bring up his silence. In the Leo case, the

E. Shaping the Right to Silence Through "Anti-Pooling" Measures Which Increase Accurate Factfinding

There remains the possibility of fashioning a right to silence that is used primarily by those guilty suspects who otherwise would tell uncontradictable lies, rather than by those who would confess or make damaging statements. According to the "anti-pooling" theory, there is no need to drive all false statements from the market, only those that are likely to be convincing, difficult to refute, and ultimately misleading. Consequently, the various aspects of the right to silence might be defined such that silence is used less by those guilty suspects who otherwise would confess or make damaging statements and more by those who would tell uncontradictable fabrications. Of course, all liars hope they will be believed, and it would not be possible to distinguish between those who would lie well and those who would not. Even if we could, it would be unfair and counter-productive to reward good liars with the right to silence, while denying the right to ineffective fabricators.

However, the right to silence and associated guarantees applicable to police interrogation could be shaped with a focus on avoiding procedures which enable suspects to lie in ways that harm the innocent through convincing fabrications. "Anti-pooling" could be furthered both by encouraging procedures which would tend to induce guilty suspects to tell the truth and by avoiding procedures which would give them additional opportunities or tools for creating uncontradictable fabrications. Seidmann and Stein give little attention to alternative "anti-pooling" methods that reduce confusing fabrications, but that offer fewer benefits for the guilty. They recognize that "the desired separation" also could be achieved by inducing more guilty suspects to confess rather than lie, but they dismiss the prospect of increasing incentives to confess, on the ground that they "generally incur greater social costs than do incentives for silence."²⁶⁵ They note only two alternative measures to "drive false statements out of the market." First, they argue increasing the punishment for lies, such as more prosecutions for perjury, would achieve similar results, but would not be feasible due to the difficulty of detecting and prosecuting liars.²⁶⁶ Second, they believe that inducing guilty suspects to produce true statements by such means as plea bargaining and witness agreements, also would achieve separation but, again, at a high social cost.²⁶⁷ They dismiss these alternatives, contending that a "much cheaper" and preferable way to "purge the lemons" is to pay potential producers of false statements to remain silent by giving them the right to do so "without sustaining punishment or adverse inference."²⁶⁸

Yet, encouraging guilty suspects to speak and incriminate themselves

judge ruled that, if the defendant testified, the prosecution could call a witness to his prior violent assault on another dog. The defendant never took the stand and was convicted. *See id.*

265. Seidmann & Stein, *supra* note 18, at 434.

266. *See id.* at 460.

267. *See id.* at 460-61.

268. *Id.* at 461.

directly, rather than remaining silent and incriminating themselves inferentially, would be a much more effective "anti-pooling" method and would more clearly separate the guilty from the innocent. The same may be said for avoiding procedures which give guilty suspects additional tools for creating uncontradictable fabrications. For example, opening the interrogation process to independent monitoring and verification would promote reliability, efficiency, and fairness. It would also lay a foundation for reconsidering some of *Miranda*'s harsh and inflexible rules, such as the requirement of automatic exclusion regardless of the extent of the impropriety, the seriousness of the case, or importance of the statement, as well as its misleading right to counsel warnings, which operate only to shut down questioning. We also might reconsider rules which prohibit questioning with respect to all crimes and for all time following a request for counsel unless the suspect initiates further discussions concerning the investigation. Justice Ginsburg has noted that "the truth-seeking function of trials places demands on defendants" and that in some cases burdening constitutional rights may be justified by the aim of sorting the guilty from the innocent.²⁶⁹ Burdening the right to silence, to some extent, may be constitutionally justified if shown to further significantly the goal of truth-determination.²⁷⁰

CONCLUSION

Seidmann and Stein contend that we should retain the right to silence as an attractive alternative to speaking during interrogation and trial on the ground that by remaining silent, the guilty refrain from "pooling" their lies with the true denials of innocents, thereby rendering the accounts of innocents more credible which "minimizes the risk" of their wrongful conviction.²⁷¹ Although the right to silence may help some guilty people avoid conviction, the authors believe that it is a small price to pay for the benefits it provides to the innocent.²⁷² The theory may be appealing in the context of an economic analysis of a rational market for exonerating statements, but, in the real word of the American criminal process, only a very few innocents likely benefit from the general "anti-pooling" effect of

269. *Portuondo v. Agard*, 529 U.S. 61, 79 (2000) (Ginsberg, J., dissenting) (contending that the truth-seeking function was not advanced by allowing the prosecutor to invite the jury to convict on the basis of the defendant's ability to hear the testimony of witnesses who testified before he took the stand, regarding such conduct "as consistent with innocence as with guilt," and finding no justification for imposing the burden when it "will not yield a compensating benefit").

270. The Supreme Court has stated that not every pressure or encouragement to waive a constitutional right is invalid and that "[t]he question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether the effect is unnecessary and therefore excessive." *United States v. Jackson*, 390 U.S. 570, 582 (1968) (holding that seeking reimbursement for trial expenses is a legitimate state objective and does not impose an unnecessary or excessive burden on the right to jury trial).

271. See Seidmann & Stein, *supra* note 18, at 457-58.

272. See *id.* at 473, 494.

the guilty who exercise their right to silence. It is unlikely that today's jurors accumulate the market savvy of serial car buyers concerning the quality of their purchases but, even if they do, only those innocent suspects who tell unconvincing stories, and against whom the evidence is neither very strong nor very weak, are in a position to reap the good that comes from fewer guilty fabricators choosing to remain silent. Furthermore, only a small proportion of guilty suspects and defendants who now claim the right to silence would, absent the right, speak and "pool" their fabrications in a way that would harm innocents. Only those guilty suspects and defendants who would tell convincing stories, absent the right to silence, would spread its "anti-pooling" benefits to the innocent by remaining silent. If the "anti-pooling" theory works at all, it does so only when the guilty pool their unverifiable stories with unverifiable explanations of the innocent, and when other evidence is neither very weak nor very strong. Thus, any benefit to the innocent, from the general "anti-pooling" effect of guilty suspects' choosing to speak rather than to remain silent, most likely is marginal at best.²⁷³

Furthermore, the right to silence is not free. A safe harbor in silence alters the conduct of not only those who would fabricate convincingly, but also of those who otherwise would confess or lie in ways which could be readily investigated and rebutted at trial. Silence on the part of the guilty may not only help them avoid conviction, it may harm the innocent in numerous ways. When the guilty either confess or lie ineffectively, witnesses and victims may avoid the trauma of testifying at trial, and innocent suspects may be cleared of suspicion. If more innocent suspects are released or innocent defendants acquitted as the result of guilty suspects' speaking and incriminating themselves than are harmed by guilty suspects' fabricating effectively, restricting the right to silence might result in an overall net benefit for the innocent.

The "anti-pooling" theory is somewhat deceptive in its implication that the right to silence is golden and should be expanded in ways that encourage more guilty people rationally to claim it. Increasing the rational use of the right to silence, particularly in the context of pretrial interrogation, can have perverse bootstrapping consequences which undermine accurate factfinding. Rules which encourage the rational use of the right to silence would tend to discourage damaging statements while encouraging effective fabrications. This would make it more likely that, when guilty suspects choose to speak to the police, their statements will not harm them but will have adverse consequences for witnesses, victims, and innocent defendants. In short, the more that interrogation rules encourage uncontradictable fabrications, as opposed to confessions or ineffective lies, the less helpful pretrial statements are to accurate factfinding. Ultimately, the loss of incriminating statements by the guilty would lead to even greater "pooling" in ways that would not only harm more innocent defendants but would help more guilty defendants avoid conviction.

273. Assuming the theory works to some extent, it should be applied according to the degree of "pooling" dangers present in a particular context. By this measure, it works less well in the pretrial context than at trial.

Yet the "anti-pooling" theory is helpful in focusing attention both on the harm that can be caused by convincing lies and on the importance of unrehearsed statements. Convincing fabrications can frustrate accurate factfinding and harm the innocent in ways even more significant than their general "pooling" effect in the marketplace of exonerating statements. Lies come in various forms and it is important to distinguish between them. Convincing falsehoods can be highly beneficial for the guilty but highly harmful to the innocent. Rebuttable and ultimately incriminating falsehoods can be as important to accurate factfinding as confessions.

More generally, Seidmann and Stein's "anti-pooling" analysis helpfully points out the dangers of a run-away right to silence and the importance of avoiding procedures which discourage unrehearsed statements and assist the guilty in their efforts to create uncontradictable fabrications. Pretrial interrogation rules designed to expand the right to silence through furthering the rational use of the right by such means as increasing the presence and advice of counsel, prohibiting deceptions, or requiring early disclosure of prosecution evidence, would cause both more effective fabrications and more use of silence by guilty suspects who otherwise would make damaging statements.

The better course would be to shape the right to silence and associated guarantees governing police interrogation by avoiding procedures which enable suspects to lie in convincing ways that harm the innocent. Without disturbing the rules prohibiting adverse inferences or *Miranda*'s basic right to silence warnings, we could separate the guilty from the innocent by adopting procedures which induce guilty suspects to tell the truth and by avoiding procedures which give them greater opportunity or means to create uncontradictable fabrications. Such reforms would offer fewer benefits to the guilty than would an expanded right to silence and would further "anti-pooling's" goal of protecting the innocent in more significant ways than the general effect of reducing the number of lies in the marketplace of exonerating statements.

BOOK REVIEWS

MORAL PRINCIPLES AND LEGAL PRACTICE

LESLIE PICKERING FRANCIS*

Review of David Orentlicher,** *MATTERS OF LIFE AND DEATH*, Princeton, Princeton University Press (2001).

In *Matters of Life and Death*,¹ David Orentlicher pursues a glorious subject: a moral theory for the translation of moral principles into moral practice. Such a theory would contribute to a central debate in applied ethics about the plausibility and structure of what is called "principlism."² Not surprisingly, principlists contend that moral principles play a major role in reasoning to conclusions about what to do in the messy circumstances of actual situations, such as whether to remove a feeding tube from a patient in the late stages of Alzheimer's disease when there is no clear indication of her prior preferences. A defense of translation principles would help to show how to bridge the apparent gaps between theory and practice which are the basis for central criticisms of principlism. Orentlicher's subject would also contribute to growing interest in what is called "partial compliance theory,"³ the idea that additional or different moral principles may be called upon in deciding what it is right to do under circumstances of injustice. Principles for the just distribution of health care, for example, might be different in a world in which racial discrimination is rampant, than in a world of racial justice, or so defenders of affirmative action contend.⁴

In much of the book, however, Orentlicher's subject is far more familiar:

* Alfred C. Emery Professor of Law, University of Utah College of Law; Professor of Philosophy, University of Utah. B.A., 1967, Wellesley College; Ph.D., 1974, University of Michigan; J.D., 1981, University of Utah College of Law.

** Samuel R. Rosen Professor of Law and Co-director of the Center for Law and Health, Indiana University School of Law—Indianapolis. A.B., 1977, Brandeis University; M.D., 1981, Harvard University Medical School; J.D., 1986, Harvard University Law School.

1. DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH* (2001).

2. See, e.g., Margaret Olivia Little, *On Knowing the "Why": Particularism and Moral Theory*, 3240 HASTINGS CENTER REP., July-Aug. 2001, at 32-40. The best known exemplar of principlism in bioethics is TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (5th ed. 2001).

3. The term is from JOHN RAWLS, *THEORY OF JUSTICE* 212-13, 215-18 (rev. ed. 1999).

4. E.g., Leslie Pickering Francis, *Affirmative Action and the Allocation of Health Care*, 66 MT. SINAI J. MED. 241 (1999).

how moral principles should, or should not, be reflected in the law. This debate is far older, going to the roots of the conflict between the positivist's conception separation of law and morality and the natural law theorist's defense of some variety of necessary connection between the two. A common positivist view has been that law consists of a set of rules, identifiable by their "pedigree," that is, by how they were adopted.⁵ In this way, principles of law can be distinguished from principles of morality. Orentlicher develops arguments for the law to employ bright-line rules that differ from the recommendations of moral theory. Although Orentlicher does not characterize his contribution in this way, his achievement might be regarded as a moral defense of positivism, through an account of why the law might justifiably employ distinctions that seem indefensible from the perspective of moral theory.⁶

This Review first develops Orentlicher's argument in some detail, showing how its principal achievements concern the translation of moral theory into legal practice in some highly controversial policy areas. In this respect, Orentlicher's book draws original links between philosophy of law and applied ethics, links that are woefully under-explored by scholars. The book is less successful, however, as a general theory for translating principle into practice, partially because of its case-based mode of argument. The final section of the review argues that some of Orentlicher's claims are better understood within the domain of partial compliance theory—that is, as strategies for translating moral principles into practice in an unjust world.

I. THREE MODELS OF TRANSLATION

Moral principles are famously abstract. "Do unto others as you would have others do unto you." "Thou shalt not kill." "Respect autonomy."⁷ "Actions are right when they will produce more happiness on the whole than available alternatives."⁸ What do such principles portend for daily dilemmas in medicine, such as whether to inform patients about very small risks of morbidity from prescribed drugs? What do they recommend for more difficult decisions, such as whether to allocate organs for transplantation based on medical need or

5. See, e.g., HART'S POSTSCRIPT (Jules L. Coleman ed., 2001); H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); JULES L. COLEMAN & JEFFRIE G. MURPHY, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE (rev. ed. 1990).

6. In a recent monograph, Larry Alexander and Emily Sherwin draw linkages between the debate about the imperfections of rules and the conflict between legal positivists and natural law theorists. Legal positivists focus on what is needed for rules to provide authoritative guidance; natural law theorists look to the effort of law to achieve moral goals. LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 184 (2001).

7. Respect autonomy is a principle applied in many fields. It is a fundamental principle in bioethics and comprises a number of medical codes. See, e.g., WORLD MEDICAL ASS'N, DECLARATION OF HELSINKI: ETHICAL PRINCIPLES FOR MEDICAL RESEARCH INVOLVING HUMAN SUBJECTS (1964); AMERICAN MEDICAL ASS'N, PRINCIPLES OF MEDICAL ETHICS (2001).

8. See RAWLS, *supra* note 3.

potential years of life saved? At the very least, abstract moral theory owes ordinary moral actors an account of why it is sometimes hard to apply principles to practice. One popular account is that difficulties in applying principles to practice lie in our ignorance about the facts. Fuller knowledge of the circumstances of a particular situation, for example, should demonstrate what action will produce the most good on the whole. Orentlicher's thesis is, instead, that at least part of the problem of translation is moral. Practice does not always reflect what would be expected from straightforward application of theory, for important moral reasons.

In the book, Orentlicher develops three methods for translating principle into practice, each in the context of a particularly thorny issue in bioethics. An advantage of such context-specific development is that it contributes to the debate over each of the issues Orentlicher treats; a disadvantage is the failure to develop systematic themes that recur across a range of problems of translation. The first translation method rejects individualized decisions in favor of generally valid rules. Orentlicher argues persuasively that the line between withdrawing or withholding care on the one hand, and active assistance in dying on the other, may be more sensible than it seems to some moral theorists. The second method recommends avoiding perverse incentives in translating principles into practice. Otherwise justified moral rules may create problematic incentives in practice, and so should not be followed. For this method, Orentlicher's example is the imposition of medical treatment on a pregnant woman for the benefit of the fetus she carries. While such compulsion might appear clearly warranted in the circumstances of a particular case, the knowledge that such practices occur risks poorer overall outcomes for fetuses, because pregnant women avoid medical care. The third method recommends disguising the use of principle when "tragic choices" are at stake. When faced with deep moral conflicts, society may be justified in avoiding clear statements of principle. Here the example is that life-sustaining treatment may be denied as "futile," an apparent judgment that it would not work, in lieu of a more public decision to ration scarce medical resources. The remainder of this section develops each of these methods in more detail, showing how they both do, and do not, connect into a more general theory of translation. The discussion also explains how they are more plausibly viewed as strategies for defending legal practice against the charge that it is morally unprincipled, than for translating moral theory into moral practice.

A. Translation by Means of Generally Valid Rules

Orentlicher's first method for translating principle into practice is the use of generally valid rules rather than case-by-case judgment. There are many reasons for relying on rules, either in morality or in law: lack of the time required for careful assessment, risk of bias, or the need to correct for inadequate information.⁹ In law, public promulgation and protection of reliance interests

9. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 135-66 (1991).

lend further support to the use of rules.¹⁰ Despite these advantages, rules may not achieve their underlying moral purpose when they are applied to particular cases. When the general moral goal is protecting autonomy, for example, a rule that physicians should respect the informed choices of competent patients may be both over- and under-inclusive. A rule is over-inclusive when it has "false positives," cases in which applying the rule to respect individual decisions would not in fact further autonomy, perhaps because there has been a failure to notice problems with competence. A rule is under-inclusive when it has "false negatives," cases in which intervention would be permitted, but a ban on intervention would further autonomy. For some rules, difficult moral choices attend whether false positives or false negatives are the more serious risks to be avoided. A system that imposes stringent due process requirements on capital convictions, for example, represents the judgment that a false positive (undeserved execution) is worse than a false negative (undeserved leniency). The imposition of more stringent standards of competence on respect for patients' choices represents the judgment that a false negative (respecting an incompetent patient's risky decision) is worse than a false positive (failing to recognize the risky decision of a competent patient).¹¹ With respect to end-of-life decision making, a commitment to life recommends that false positives (allowing unjustified deaths) are worse than false negatives (not permitting justified deaths). In contrast, a commitment to allowing individuals to control how they die and the memories which survive them suggests that false negatives are the more serious risks. This last difference lies at the heart of the disagreement between Chief Justice Rehnquist's insistence that states may require clear and convincing evidence of the patient's prior wishes before care may be withdrawn from an incompetent patient, and Justice Brennan's conclusion that the stringent evidentiary standard impermissibly burdens the patient's right to die with dignity.¹²

When rules are over- or under-inclusive, case-by-case judgments may be the better strategy for achieving underlying moral goals. But this move raises difficulties of its own. Suppose, with respect to end-of-life decisions, that the moral goal is to prevent "unjustified" but permit "justified" deaths. Case-by-case efforts to decide whether death is justified may misfire, just as may the application of rules. Moreover, such individualized inquiries may bring divisive social scrutiny into the private lives of individual patients. Orentlicher's strategy is to bypass much of the disagreement about when a death is "justified," by arguing that two principal accounts of justified death each independently support reliance on a general rule, the rule that consensual withholdings or withdrawals of care are permissible, but consensual aid-in-dying is not, despite the fact that many commentators have argued convincing that there is no defensible

10. *Id.* at 139-41.

11. This view is taken by ALLEN E. BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* (1989).

12. *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990).

distinction in moral theory between the two.¹³ Orentlicher's arguments here are complex and worthy of careful attention. For he does not employ the standard objections of slippery slopes (where is American health care, anyway, on slopes tilting towards or away from problematic forms of euthanasia?¹⁴) or exploitation of the vulnerable (aren't those who are not allowed to die as vulnerable as those who die prematurely as a result of inadequate health care?). Instead, Orentlicher argues that on two principal accounts of justified death—the autonomy view and the no-real-life-left view—case-by-case decision making is morally flawed. In the end, however, Orentlicher's argument is more persuasive as a defense of the law's use of a bright-line rule distinguishing withholding or withdrawing care from aid-in-dying, than of reliance on such a rule in moral practice.

Orentlicher first defends the general rule in light of the autonomy view of justified death. On this view, deaths are justified when, and only when, they are genuinely chosen by competent patients. Any given instance of withholding or withdrawing care, or assisted death, is only justified if genuinely chosen by a competent patient. False positives would result from judging wrongly that a decision was genuine, perhaps from failure to identify coercion, depression, or problems with competence. Bayesian analysis holds that the ratio of false to true positives is likely to be high when the background probability of true positives is low, and low when the background probability of true positives is high. Thus if the background probability of a suicide's being genuinely chosen is low, the probability that a positive is a false positive would be higher than if the background probability of a suicide's being genuinely chosen is high. Orentlicher believes that these differences in background probabilities are indeed the case: withholdings or withdrawals of care are likely to be genuinely chosen, suicides much less so. Defenders of autonomy, he concludes, would be well advised to adopt the general rule that withholdings and withdrawals should be permitted, but aid-in-dying should not be.

This argument is elegant, but deceptively so, since Orentlicher is not entirely clear about the relevant contrast classes. If his argument contrasts all withholdings or withdrawals of care from all cases of physician aid-in-dying, then all cases of each are the relevant contrast classes. If his argument contrasts all withholdings or withdrawals of care for patients who are irreversibly ill from all cases of physician aid-in-dying for patients who are irreversibly ill, these are the relevant contrast classes. In asserting that withholdings or withdrawals are likely to be genuinely chosen, but suicides are not, however, Orentlicher contrasts withholdings of life-sustaining treatment (a category which builds in the fact that the patient is at least ill, in virtue of the need for life-sustaining treatment) with all suicides, including those of the depressed young.¹⁵ But if the relevant contrast classes are held constant, as Orentlicher to some extent

13. Perhaps the seminal article in this vein is James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975).

14. See, e.g., Wibran Van den burg, *The Slippery Slope Argument*, 102 ETHICS 42 (1991).

15. ORENTLICHER, *supra* note 1, at 64.

recognizes,¹⁶ the false positive rates may not be so different. Indeed, some commentators have argued that, in the United States, the false positive rate may be as high, higher, or ignored altogether for withholdings or withdrawals from ill patients, as it is for assisted suicides.¹⁷

In the end, Orentlicher recognizes that if terminally ill patients seeking to have care withheld or withdrawn are compared to terminally ill patients seeking assisted deaths, the false positive rates may be comparable. Thus he concludes that a limited exception to the legal prohibition of aid-in-dying for the competent, terminally ill, as in Oregon, may be justified.¹⁸ But to apply such an exception more generally raises the second moral reason for favoring a bright-line distinction between withholding or withdrawing care and aid-in-dying. Orentlicher foregrounds this reason from the perspective of another, commonly-accepted account of justified death: that death is justified when the remaining quality of life is limited or low. When the moral goal is to permit these, but only these deaths, case-by-case decisions will rest on judgments about the quality of life for individual patients. If these are to be legal judgments, they will require assessment of the individual's quality of life by an outside entity, such as a court, an ethics committee, or some other regulatory body. However, on what might be called the Mill principle,¹⁹ that the individual is the best judge of his/her own interests, such outside judgments should be resisted, Orentlicher contends.²⁰ Outside entities are in less favorable epistemological positions than individuals themselves; moreover, for outside entities to try to gather sufficient information about individual cases would significantly intrude on privacy. Such intrusive assessments could be avoided if the law were to adopt a bright-line rule. Once again, Orentlicher contends, the line should be drawn between withholdings or withdrawals and aid-in-dying, because of the likelihood that the former, but not the latter, reflect accurate judgments about the quality of life left.

But this argument is problematic for some of the same reasons as the first argument. When the contrast classes are held constant, so that withholdings or withdrawals and aid-in-dying are compared for similar groups of patients, it is not clear that the former group will contain a higher percentage of accurate quality-of-life-left judgments than the latter. Indeed, disability advocates contend that judgments about quality of life are notoriously erroneous in both cases.²¹ To be sure that decisions are made which reflect the moral goal of permitting only justified deaths will require more particularized inquiry into individual circumstances. Indeed, if the Mill premise is correct, it will be ill-advised for outside authorities to engage in this scrutiny. But this argument only supports the

16. *Id.*

17. *E.g.*, Margaret P. Battin, *Euthanasia: The Way We Do It, the Way They Do It*, 6 J. PAIN & SYMPTOM MANAGEMENT (1991).

18. Death With Dignity Act, OR. REV. STAT. §§ 127.800-127.897 (1999).

19. From JOHN STUART MILL, ON LIBERTY (David Spitz ed., Norton 1975) (1859).

20. ORENTLICHER, *supra* note 1, at 67.

21. *See, e.g.*, ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 87 (1998).

use of a general translation principle to avoid bringing in the law, not to ensure more accurate moral decisions. Orentlicher correctly points to moral objections to making quality of life judgments for others, but he has not shown why such judgments are required when moral principle is translated into moral, rather than legal, practice.

B. When Moral Principles Go Wrong: The Problem of Perverse Incentives

Orentlicher's second model for applying principle to practice is the avoidance of perverse incentives. Moral principles should not be put into play in ways that are self-defeating or that threaten to undermine other moral values. Distinguishing between translation outcomes into moral and into legal practice is central to the evaluation of this model. When assessing a translation into moral practice, the concern is whether the principle (or other moral goals) would be undermined by its direct application. There is extensive literature, for example, on whether applying the principle of utility in every day moral life would encourage people to behave in ways that do not promote the overall good.²² When assessing translation into legal practice, the coercive and distributive effects of the law come to the fore. Thus it is more difficult to defend the claim that pregnant women have legal obligations to undergo medical care for the benefit of the fetuses they carry, than the claim that they have moral obligations to accept such care.²³ In discussing perverse incentives, Orentlicher makes clear that his goal is translating moral principle into legal, rather than moral, practice, Orentlicher develops two approaches to the dilemma.²⁴ One is to hold that pregnant women have limited legal obligations to accept medical treatment that would benefit both them and their fetuses. The other approach accepts, regretfully, that pregnant women have no such legal obligations to accept medical intervention, because the requirement may create incentives for pregnant women fearful of coercion to avoid prenatal care altogether. Orentlicher concludes that which alternative is preferable is an unresolved question.²⁵ His argument, however, attends less fully than it might to some of the general moral concerns about translation that inform his defense of the use of generally valid rules.

The perverse incentives concern is that a general practice of forcible intervention for the benefit of the fetus will deter pregnant women from seeking medical care. At least for the limited situation in which the care is beneficial to both the pregnant woman and the fetus, Orentlicher thinks this risk is real, but manageable. The risk is magnified when decisions need to be made quickly, by

22. A central work in this vein is D.H. HODGSON, *CONSEQUENCES OF UTILITARIANISM: A STUDY IN NORMATIVE ETHICS AND LEGAL THEORY* (1967). See also R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* (1981).

23. See, e.g., Bonnie Steinbock, *Maternal-Fetal Conflict and In Utero Fetal Therapy*, 57 ALB. L. REV. 781, 791 (1994).

24. ORENTLICHER, *supra* note 1, at 89-90.

25. *Id.* at 90, 119.

judges who lack information about the circumstances of a particular case or knowledge about medicine generally.²⁶ Orentlicher believes these difficulties can be mitigated by the availability of appellate review, which can set out general standards for use in such cases; a clear and convincing evidence standard for intervention, for example, would help to guard against any bias of the medical profession in favor of intervention.²⁷ He does not, however, explore the possibility that inequalities in access to legal services will skew the protections of appellate review.²⁸ Nor, with the exception of litigation involving Jehovah's Witnesses, does he explore the possibility that the perverse incentives concern will be more powerful for some groups—racial and ethnic minorities particularly—than for others.

A further noticeable gap in Orentlicher's discussion of perverse incentives is his failure to explore why there is such a lack of evidence, on one side or the other, about perverse incentives claims. There are many other examples of possible, but unstudied perverse incentives hypotheses. Psychiatrists are concerned that duties to warn will deter patients from seeking care in an honest fashion.²⁹ Infectious disease specialists worry that duties to report positive HIV tests will discourage testing and reporting that are invaluable from a public health perspective.³⁰ Geriatricians voice the concern that duties to report conditions that increase risks of driving, such as Alzheimer's disease, will unfairly burden those who seek care.³¹ Lawyers defend stringent obligations of confidentiality as necessary to adequate assistance of counsel. And so on. None of these empirical contentions have undergone rigorous scrutiny, perhaps because of ethical and other pragmatic difficulties in designing the research. (Would it be morally permissible to randomize defendants to confidentiality-protecting and non-confidentiality-protecting lawyers, and assess the resulting quality of the lawyer-client communications?) Orentlicher could, but does not, explore the troublesome point that moral considerations, about experimentation and the delivery of professional services, partially explain both the power and the insubstantiality of the perverse incentives concern.³² Ironically, while supporting the concern, moral considerations also at least partially explain our inability to assess how serious it really is, and thus Orentlicher's ability to determine its genuine weight.

26. A well-known example of such difficulties is the case of Angela Carder, a pregnant woman dying of osteosarcoma. She was compelled to undergo a caesarean section by court order, but neither she nor the infant survived. See *In re A.C.*, 573 A.2d 1235 (D.C. Cir. 1990).

27. ORENTLICHER, *supra* note 1, at 116.

28. This issue is discussed more fully in Part II, *infra*.

29. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

30. See, e.g., RONALD BAYER, *PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH* 1-72 (1989).

31. Bruce Jennings, *Freedom Fading: On Dementia, Best Interests, and Public Safety*, 35 GA. L. REV. 591, 602 (2001).

32. See, e.g., ORENTLICHER, *supra* note 1, at 90 (stating that the conclusion will depend on "how one estimates unknown empirical data").

The other alternative is that pregnant women have a legal duty to accept medical care, at least when it is beneficial both to them and to their fetuses. This alternative conflicts with the legal doctrine that competent individuals do not have a duty to accept medical care, even when it clearly would benefit them.³³ But the situation of a pregnant woman who plans to carry the pregnancy to term is different, Orentlicher contends, because parents give up liberty rights in deciding to have children. Parents, for example, are not free to travel without considering their children.³⁴ Orentlicher admits that the legal duty of parents to care for their children has not been extended to the obligation to undergo medical treatment. Indeed, there are no reported cases of parents being legally required to undergo even the most minimal medical procedures, such as donating blood, to preserve the life or health of their children.³⁵ However, Orentlicher contends, the crucial feature of this legal limit is that the parent's interests are in some degree of conflict, however minimal, with the child's. When the pregnant woman would also be benefitted, Orentlicher contends, there might be a case for imposing the legal obligation to accept the care on her. Here, his analogy is to asking a parent to step aside so that a physician can offer needed medical care to the child.³⁶ This limited legal obligation, Orentlicher contends, would be consistent with other legal obligations which society imposes on people when both they and others would benefit.³⁷

Orentlicher admits that his argument here employs what some might regard as a "narrow view of harm and benefit to the pregnant woman."³⁸ Although the pregnant woman would not be forced to undergo medical care that puts her health at risk, she would be forced to undergo care that might adversely affect her non-medical interests: in liberty, in dignity, in religious commitment, or even in body image. Invasions of such other interests, Orentlicher counters, are frequently countenanced when special relationships generate duties of care. The mere fact of a bodily invasion should not matter, he writes: "[I]t is hard to see why bodily invasions are worse than other limitations on autonomy, beyond the fact that they pose a real risk to one's health."³⁹ His critics might reply that it is this very *invasiveness* which matters. His critics might also point out Orentlicher here abandons his reluctance to substitute external, legal judgments for the

33. See, e.g., *In re Duran*, 769 A.2d 497 (Pa. Super. Ct. 2001); *Stamford Hosp. v. Vega*, 674 A.2d 821 (Conn. 1996); *Pub. Health Trust of Dade County v. Wons*, 541 So.2d 96 (Fla. 1989); *Bouvia v. Super. Ct.*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

34. ORENTLICHER, *supra* note 1, at 99.

35. Orentlicher simply cites a constitutional law text in support of his claim. *Id.* at 205 n.52. Although it is always difficult to prove a negative, the stronger claim advanced here is based on a LEXIS search of combined state and federal case law and all law review data bases, with the following search: (parent! or mother or father) and (forc! or compel! or request!) and ((donat! or giv!) W/2 (blood or (bone marrow))).

36. *Id.* at 108.

37. *Id.* at 110.

38. *Id.* at 112.

39. *Id.*

individual's judgment of her own best interests, which he used to support a bright line between withholding or withdrawing care and aid-in-dying. Applying Orentlicher's second approach both requires a decision about whether the imposition of medical care is in a pregnant woman's health interests, and grants that invasions of health interests are especially serious. Critics might well question these judgments about interests, and urge instead drawing a bright line against legal coercion of pregnant women to undergo medical treatment, even when it is supposed to be for their own benefit. This line of criticism is stronger still if there are reasons for concern that some judgments here are tainted by injustice based on race or sex, as Part II below explores.

C. *Tragic Choices and Moral Deception*

Democratic societies find it hard to make open decisions in the face of deep moral conflicts and high stakes for individual lives. So such societies sometimes disguise the decision rules they actually use. "Tragic choices"⁴⁰ of life and death may be made by replacing explicit value choices with apparently neutral rules and procedures, such as markets, lotteries, irresponsible agencies, or technical experts. Judgments that further medical care would be "futile," in Orentlicher's example, frequently represent the subterfuge of transforming an evaluative judgment that rationing is justified into an apparently technical determination that a patient is not a candidate for given therapy.⁴¹ The moral justification of such subterfuge is Orentlicher's third translation problem.

Judgments that further medical care would be futile are notoriously plastic.⁴² These judgments range from the simple factual claim that care will not achieve its intended result (an antibiotic will not work against a virus) to evaluative judgments that given goals are not worthwhile (why maintain a patient in a persistent vegetative state?), to rationing judgments that care is too costly in light of possible results (why maintain an anencephalic infant at great state expense?). Despite careful efforts to establish conceptual clarity about futility,⁴³ judgments intertwining these concepts remain. Deliberately cloaking a judgment to ration in the language of science is morally troubling because it may generate mistrust of medicine and disenfranchise families and patients from challenging

40. The term is from GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

41. ORENTLICHER, *supra* note 1, at 130-31. Another example may be the current trend towards using "evidence-based" medicine in making decisions about what procedures should be covered by various health insurance programs. See, e.g., Alan M. Garber, *Evidence-Based Coverage Policy; Insurers Can Borrow from Research into Medical Effectiveness to Help Them Allocate Medical Resources Wisely*, HEALTH AFFAIRS 6282 (2001); J.D. Swales, *Science and Health Care: An Uneasy Partnership*, 355 LANCET 1637-40 (2000).

42. See, e.g., Robert D. Truog et al., *The Problem with Futility*, 326 NEW ENG. J. MED. 1560 (1992); Steven H. Miles, *Informed Demand for 'Non-beneficial' Medical Treatment*, 325 NEW ENG. J. MED. 512 (1991); Lawrence J. Schneiderman et al., *Medical Futility: Its Meaning and Ethical Implications*, 112 ANNALS OF INTERNAL MED. 949 (1990).

43. See sources cited *supra* note 42.

supposedly technical judgments. But if decisions by physicians to ration can themselves be justified—and Orentlicher believes they sometimes can—then there may be moral reasons which support keeping them under wraps.

Rationing decisions are inevitable, Orentlicher argues, and physicians, familiar with the nuances of particular cases, will inevitably be involved at some level in making them.⁴⁴ In a discussion remarkably at odds with his original support for general rules, Orentlicher notes that rules are indeterminate,⁴⁵ physicians will not tolerate guidelines with which they disagree,⁴⁶ and physicians in any event are likely to make decisions that are more sensitive to the circumstances of individual cases.⁴⁷ Orentlicher offers no explanation for his divergent treatment of rules; perhaps he is simply more comfortable with physicians making judgments to ration care than with physicians making judgments to aid death. If so, his conclusions seem ad hoc, suggesting the appropriateness of further reflection on when resort to generally valid rules is helpful. Part II below suggests that concerns to counter the effects of background injustice may help to explain resort to rules in some contexts but not in others.

Orentlicher then surveys the moral reasons that might support disguising the decisions to ration as judgments about futility. The first is that apparently scientific judgments of futility are needed to counter stringent rules about withholding or withdrawing care, in particular the use in some states of the clear and convincing evidence standard. Since physicians are not obligated to provide care that is not medically indicated, futility judgments might serve to avoid invocation of the strict evidentiary standard. As a matter of fact, however, Orentlicher believes, futility judgments are most likely to be made in the cases in which the evidentiary standard tends to be less strict—cases in which the patient is terminally ill or in a persistent vegetative state. Thus avoiding the evidentiary standard does not explain resort to futility.⁴⁸ Orentlicher's hypothesis about when futility judgments are invoked may be accurate, but it is interesting to speculate whether it will continue to hold in the aftermath of several major states' adoptions of the clear and convincing evidence standard for patients who are not terminally ill or in persistent vegetative states.⁴⁹ A second explanation for disguising rationing as futility may be the need to avoid costly reconsideration of rationing decisions on a case-by-case basis. Orentlicher believes there are examples of the use of bright-line rules to avoid case-by-case reconsideration, but he does not believe they have typically invoked futility. His examples are the variety of brain death statutes and the Oregon rationing scheme.⁵⁰

44. ORENTLICHER, *supra* note 1, at 150-52.

45. *Id.* at 149.

46. *Id.* at 150.

47. *Id.* at 152.

48. *Id.* at 154.

49. *See* Conservatorship of Wendland, 28 P.3d 151 (Cal. 2001); *In re Edna M.F.*, 563 N.W.2d 485 (Wis. 1997).

50. ORENTLICHER, *supra* note 1, at 157.

The need to hide tragic choices, in Orentlicher's judgment, is a third explanation that does justify disguising rationing judgments as judgments about futility. Because we cannot say to individual patients that a choice has been made between preserving their lives and providing care to others, we characterize the care as not indicated for them in the first place. The apparent expert judgment that they are "not qualified" replaces the judgment that care for them is worth less than care for others. That burying tragic choices explains the subterfuge does not, however, justify it. One concern, that growing public understanding may undermine the subterfuge's effectiveness, is omnipresent.⁵¹ From a moral point of view, an even more important concern is the dishonesty itself. When physicians disguise the bases for their recommendations about care, they violate their patients' trust, albeit for more general social ends. Like Sissela Bok, Orentlicher believes that there may be circumstances in which society has implicitly authorized the deception.⁵² Rationing medical care may be an example of such implicit authorization.⁵³

As a justification for a strategy for translating moral principle into moral practice, this is surely inadequate. Orentlicher recognizes its weakness, but seems to believe that all that can be said here is that we are weighing two values, deception and rationing, and simply need to decide which is the stronger.⁵⁴ The perspective of political philosophy, however, would have us ask when it is appropriate for society to disguise decisions rather than to subject them to open scrutiny. Britain, for example, came under intense criticism for disguising rationing decisions as decisions about medical appropriateness without open dialogue.⁵⁵ Britain was also criticized for maintaining the reasonable physician, rather than the reasonable patient, standard for informed consent as an implicit rationing strategy.⁵⁶ Surely there is more to be said about when it is appropriate to avoid open dialogue, and when deliberative democracy should hold sway.⁵⁷ In Bok's example of implicit authorization, undercover policing, there are arguments to be made that the protection is for the benefit of everyone and that the deception is constrained by stringent monitoring. There are also arguments that those ensnared by the deception have themselves acted wrongly and that their treatment is constrained by strict constitutional and other limits. None of these features would appear to characterize the rationing of health care—even if we think the underlying decision to ration care is itself just. Instead, we might argue, public scrutiny is exactly what is needed to reassure us that rationing

51. *Id.* at 162.

52. SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 165-81 (Vintage Books 1989) (1978). Bok's example is undercover policing.

53. ORENTLICHER, *supra* note 1, at 163.

54. *Id.*

55. *E.g.*, HENRY J. AARON & WILLIAM B. SCHWARTZ, *THE PAINFUL PRESCRIPTION* (1984).

56. Robert Schwartz & Andrew Grubb, *Why Britain Cannot Afford Informed Consent*, 15 HASTINGS CENTER REP., Aug. 1985, at 19.

57. The term is from AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

decisions are as just as they can be. Without such scrutiny, we cannot be sure that hidden rationing does not add the immorality of deceit to the injustice of rationing.

II. IDEAL MORAL RULES AND MORAL PRACTICE UNDER CIRCUMSTANCES OF INJUSTICE

When moral rules are translated into moral practice in ordinary life, they may well confront circumstances of injustice. In coining the term "partial compliance theory," John Rawls suggested that the translation rules governing circumstances of injustice might be different from those governing translation into a just world.⁵⁸ At the very least, whether the rules are the same requires investigation and argument. Perhaps the translation is merely linear, so that in applying moral rules to circumstances of injustice we should simply try to further progress towards justice, bearing in mind the need to avoid problems like perverse incentives which might impede progress. Or, perhaps, more complex moral considerations come into play, including consideration of what is involved in respect for persons under circumstances of injustice.

Each of the translation problems Orentlicher considers in detail arguably involve translation into circumstances of at least moderate injustice. In the United States, access to health care is impressively variable.⁵⁹ At any given time, over forty million Americans lack any form of health insurance, and many others are under-insured.⁶⁰ Many recent articles have highlighted significant differences in effective access to care by race.⁶¹ Injustice in the distribution of health care may reflect and complicate other persistent forms of injustice in American society. Given such pervasive concerns about justice and health care, it seems reasonable to at least consider how problems of justice might affect the morality of translation practices in each of Orentlicher's examples.

With end of life decision-making, including aid-in-dying, issues of justice

58. See RAWLS, *supra* note 3, at 215-18.

59. See, e.g., R. Adams Dudley & Harold S. Luft, *Managed Care in Transition*, 344 N. ENG. J. MED. 1087 (2001).

60. See, e.g., John Holahan & Brenda Spillman, *Health Care Access for Uninsured Adults: A Strong Safety Net Is Not the Same as Insurance*, URBAN INSTITUTE (2002), at www.urban.org (2002).

61. E.g., John Z. Ayanian et al., *The Effect of Patients' Preferences on Racial Differences in Access to Renal Transplantation*, 341 NEW ENG. J. MED. 1661 (1999); Peter B. Bach et al., *Racial Differences in the Treatment of Early-Stage Lung Cancer*, 341 NEW ENG. J. MED. 1198 (1999); J. Marie Barnhart & Sylvia Wosser Meil-Smoller et al., *Racial Variation in the Use of Coronary Revascularization Procedures*, 339 NEW ENG. J. MED. 131 (1997); Risa B. Burns et al., *Black Women Receive Less Mammography Even with Similar Use of Primary Care*, 125 ANNALS INTERNAL MED. 173 (1996); Linda C. Harlan et al., *Factors Associated with Initial Therapy for Clinically Localized Prostate Cancer: Prostate Cancer Outcomes Study*, 93 J. NAT'L CANCER INST. 1864 (2001); Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203 (2001).

include prior access to care and access to end of life care, as well as background inequalities in distribution of wealth, education, employment, and other social goods. Suppose we believed that in translating moral principles into moral practice, we should take particular care not to magnify unjust treatment of those who have already been victimized by injustice. We might then be particularly concerned that end of life decision making not deepen existing injustice. Inadequate access to palliative care or to hospice, for example, might deepen the injustice already experienced by those who, with limited access to care, have had illness diagnosed at later, less treatable stages, or who have received less effective forms of therapy. There is evidence that African-Americans have more difficulties in access to palliative care than other Americans.⁶² There is also evidence that African-Americans are less likely to favor withdrawing or withholding care, as well as physician assisted suicide, possibly in part because of failures of trust and concerns about discrimination.⁶³ Concerns about deepening already-existing injustice might generate support for adopting bright-line tests that would not draw support in a world of more perfect justice. The American Bar Association Commission on the Legal Problems of the Elderly, for example, opposed the legalization of aid-in-dying absent universal health care in the United States.⁶⁴ On the other side, there is longstanding suspicion that women are not viewed as fully autonomous agents in end-of-life decision making.⁶⁵ Such suspicion might suggest greater attention to patient choice in decisions whether to withdraw, withhold, or continue care, especially when the patient is a woman.

For the example of compelled treatment of fetuses, the background concern is discrimination based on race and sex. When the intervention was compelled caesarean sections, data indicated that a high proportion of the patients were women of color. Many also did not speak English as a first language.⁶⁶ Critics

62. See Vence L. Bonham, *Race, Ethnicity, and Pain Treatment: Striving to Understand the Causes and Solutions to the Disparities in Pain Treatment*, 29 J. LAW MED & ETHICS 52 (2001); LaVera Crawley et al., *Palliative and End-of-Life Care in the African-American Community*, 284 JAMA 2518 (2000); *Pain Drugs: Access Difficult in Minority Neighborhoods*, AM. HEALTH LINE, Apr. 6, 2000; *Palliative Care: Bridging the Race Divide at Death*, AM. HEALTH LINE, Feb. 16, 2000.

63. *Researchers Measure Attitudes about Death Among Terminally Ill Cancer Patients*, PAIN & CENT. NERVOUS SYS. WK., July 15, 2000.

64. Leslie Pickering Francis, *Assisted Suicide: Are the Elderly a Special Case?*, in PHYSICIAN ASSISTED SUICIDE (Battin, Rhodes, & Silvers, eds. 1998).

65. See Steven H. Miles & Allison August, *Courts, Gender and the "Right to Die,"* 18 L., MED. & HEALTHCARE 85 (1990). Miles and August discussed reported cases in which withholding or withdrawing care was sought on behalf of incompetent patients. It is perhaps worth noting anecdotally that the most prominent effort to insist on continued care, over physicians' objections that the care was futile and that the patient's preferences were unclear, also involved a woman patient. Miles, *supra* note 42.

66. Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (1987).

objected that court-ordered maternal intervention was both sexist and racist. If we agree that as a matter of partial compliance theory we should avoid perverse incentives, we might in addition be especially concerned about incentives that operate against already-disadvantaged groups. We might also be concerned about actions that risk new forms of injustice. Nancy Rhoden argued a number of years ago that court-ordered caesarean sections, even when they might benefit both fetus and mother, risk creating precedent that can be used in troubling ways to justify intervention with reproductive liberty.⁶⁷ More recently, Laura Shanner has argued in the context of Canadian law that legally compelling pregnant women to seek medical care may have “dangerous” implications for women, even when good moral arguments support the intervention.⁶⁸

Underlying the disguise of decisions to ration as judgments of medical futility is the problem of macroallocation of social resources. Do we, as a society, spend sufficient dollars on health care, and do we direct the dollars we spend appropriately? This is not a debate that American society has handled particularly well in recent years. At least part of the problem is that we have created some entitlements that are very costly without full examination, and then recoiled from creating other entitlements as a result. The United States offers more renal dialysis than other advanced industrialized countries, at public expense, yet fails to offer universal access to health care. A plausible maxim of partial compliance theory is that when we act to increase justice, we should take care generally not to create new moral roadblocks. Hasty adoption of the end stage renal disease program in Medicare has perhaps operated in just this way. Orentlicher’s argument about tragic choices is that we may sometimes find it too painful to explain the application of a rationing decision in the context of an individual case. To be sure, but it is important also to recognize how our silence may contribute to continued injustice in American health care overall.

First of all, when decisions to ration are disguised, individual patients may lose the opportunity for dialogue about care options and their desirability. Discrimination against patients who are disabled, elderly, or disadvantaged, may go unexamined. On the other side, we lose the opportunity for dialogue about when care may be undesirable. Hiding judgments about rationing as judgments about futility may encourage people to think that all care is desirable until it is labeled as futile. An apt example is patient preferences for cardiopulmonary resuscitation. Patients are less likely to choose resuscitation when they have a clear idea of what it involves and what their prognoses with it may be.⁶⁹ Our acquiescence in disguise on an individual level may contribute to ill-informed or unjust decisions in individual cases. It may also compound our inability, on a social level, to further justice in health care. Without the realization that we, as

67. E.g., Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Caesarians*, 74 CAL. L. REV. 1951 (1986).

68. Laura Shanner, *Pregnancy Intervention and Models of Maternal-Fetal Relationship: Philosophical Reflections on the Winnipeg C.F.S. Dissent*, 36 ALBERTA L. REV. 751 (1998).

69. Donald J. Murphy et al., *The Influence of the Probability of Survival on Patients' Preferences Regarding Cardiopulmonary Resuscitation*, 330 NEW ENG. J. MED. 545 (1994).

individuals, sometimes find care no longer worthwhile we may also lose the opportunity, *as a society*, to discuss when we believe care is worthwhile and when we believe it is not. In short, the failure to face tragic choices is not always benign or limited to the circumstances of the individual case. If problems of cost-control and access are inter-related, as many commentators contend,⁷⁰ the tragic choices strategy may play a role in entrenching the injustices in American health care today.

CONCLUSION

Matters of Life and Death makes important contributions to our understanding of how we apply moral principles in the complex circumstances of moral life. Orentlicher explores three concerns which arise in translating moral principles into practice: our need for principles; our need to be sure that our principles, when we have them, do not create perverse incentives; and our occasional need to disguise from ourselves the principles we are using, when we use them. Orentlicher shows us how each of these translation strategies has shaped our approach to moral problems in contemporary health care, from end of life decision making, to public health, to decisions to ration health care. That there is more to be said about how the translation strategies might interrelate or apply against the background of existing injustice by no means diminishes the insightfulness of Orentlicher's work. Indeed, it only suggests how a good book prompts us to think harder and to do better.

70. See, e.g., Norman Daniels & James Sabin, *Last Chance Therapies and Managed Care: Pluralism, Fair Procedures and Legitimacy*, 28 HASTINGS CENTER REP. 72 (1998).

A DEMOCRACY FOR THE PURSUIT OF HAPPINESS

DAVID RAY PAPKE*

Review of John Denvir, *DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP*, Urbana and Chicago, Illinois: University of Illinois Press (2001).

INTRODUCTION

A career in the law can be politically and intellectually narrowing. Lawyers, judges, and law professors can dig deeper and deeper into a legal subject matter and in the process lose any sense of social justice and willingness to think critically. The “answer” becomes not a section of the Uniform Commercial Code but rather the reigning interpretation of a sub-section of the section within a specific jurisdiction. The “issue” becomes not the need for faithful post-divorce child support but instead the way support is calculated on a monthly basis given the particular published guidelines of a selected county. In the end, the taste for political debate and fresh ideas is lost. The buoyant legalist becomes a tired technician.

John Denvir's *Democracy's Constitution: Claiming the Privileges of American Citizenship* illustrates that the legalist's development need not follow this path. A senior professor at the University of San Francisco Law School, Denvir has specialized in constitutional law and jurisprudence, and he has both published an influential volume and edited a website concerned with the interrelationships of law and film.¹ In *Democracy's Constitution* he seems a scholar whose career in the law has made him broader and more optimistic rather than narrower and more cynical. After twenty-five years of teaching constitutional law, he still subscribes to “constitutional hope”—a faith that in the long run the American people will want a government that reflects their highest political ideals.”²

Denvir's willingness to base his “constitutional hope” on the recognition and expansion of rights contrasts with the reservations about emphasizing rights in such recent scholarly works as Lawrence Friedman's *The Republic of Choice: Law, Authority and Culture* and Mary Ann Glendon's *Rights Talk: The Impoverishment of Political Discourse*.³ Friedman, one of the nation's most distinguished historians, looks at the way new individualism in America insists

* Professor of Law, Marquette University Law School. A.B., 1969, Harvard College; J.D., 1973, Yale Law School; Ph.D. in American Studies, 1984, University of Michigan.

1. LEGAL REELISM: MOVIES AS LEGAL TEXTS (John Denvir ed., 1996); *Picturing Justice: The On-line Journal of Law & Popular Culture*, at <http://www.usfca.edu/pj>.

2. JOHN DENVIR, *DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP* 127 (2001).

3. LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY AND CULTURE* (1990); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

on a zone of choice.⁴ This emphasis on choice, in turn, leads to a pronounced "rights-consciousness" because choices are "meaningless unless a citizen can convert the choices into entitlements."⁵ For her part, Glendon is concerned with the impoverishment of contemporary American politics. Virtually every controversy is framed as a clash of rights.⁶ Yet, this "rights talk" is harmed by "its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities."⁷

Rather than warning about a "rights-consciousness" or "rights talk," Denvir proposes that we recognize overlooked or completely new rights.⁸ In particular, he discusses the rights to earn a living, to receive a first-rate education, to engage in political speech, and to cast meaningful votes. While placing each of these rights into a constitutional law context, he suggests affirmative legislative actions which could buoy each of the rights.⁹ Recognizing these rights, he argues, would create the type of democracy in which people could truly pursue happiness.¹⁰ In the end, *Democracy's Constitution* is an inspiring example of how one might achieve political and intellectual self-actualization within the constitutional law discourse.

I. WHAT IS THE CONSTITUTION?

Denvir begins *Democracy's Constitution* by asking readers to contemplate the very nature of the Constitution. On one level, he says, the Constitution is an "icon."¹¹ We should not overlook this point. In general we might think of icons as religious. The carvings and paintings of the Byzantine faith spring to mind, as does the crafted image of Jesus Christ on the cross. However, as Denvir implies, icons may also be secular.¹² In the context of the American civil faith, the Constitution serves as an especially powerful mindmark of Americanism.¹³ Both staunch defenders of Americanism and its critics refer to the iconic and symbolic Constitution.¹⁴ In the context of the American secular or civic faith the Constitution, to borrow from the quirky yet prescient Marshall McLuhan is, "an

4. See FRIEDMAN, *supra* note 3, at 2.

5. *Id.* at 97.

6. GLENDON, *supra* note 3.

7. *Id.* at x.

8. DENVIR, *supra* note 2, at xi.

9. *Id.* at 11.

10. *Id.* at 8-9.

11. *Id.* at ix.

12. *Id.*

13. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 5 (1988).

14. For a wide range of responses to the Constitution, see THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AN ESPECIALLY SOCIALIST CRITICISM (Bertell Ollman & Jonathan Birnbaum eds., 1990) [hereinafter THE UNITED STATES CONSTITUTION].

audile-tactile form of resonant interface.”¹⁵

Denvir also suggests that the Constitution may be conceived as a “contract.”¹⁶ Presumably, he has in mind a “social contract,” that is, the type of agreement on how to live together which has engaged philosophers ranging from the Greek Sophists to Enlightenment figures such as Hobbes, Locke, Rousseau, and Montesquieu.¹⁷ The drafters of the Constitution were in fact influenced by Enlightenment social contract theorists, and the resulting document is a social contract in both a metaphorical and an actual sense.¹⁸ The framers intended the Constitution to be the compact for American government.¹⁹

On a third and ultimately preferred level, Denvir invites us to think of the Constitution as a “blueprint for the American political community.”²⁰ The Germans seem close to Denvir’s conceptualization with their notion of *Verfassungsrecht*. The German noun *Verfassen* derives from the verb *verfassen*, meaning to draft or tie together. *Recht*, of course, means law. A *Verfassungsrecht* is therefore a composing law, a legal drafting up.

Denvir reminds us that we might look to the Declaration of Independence for help in making sense of the blueprint.²¹ Others before Denvir have also made this suggestion, and even the venerable U.S. Code includes the Declaration of Independence as one of the nation’s four organic laws.²² For Denvir, the Declaration of Independence is crucial because it guides our efforts to determine which principles distinguish the American political and legal culture.²³ He says that American democracy “requires the guarantee to all its citizens of a realistic opportunity to pursue happiness as they define it.”²⁴

With the Declaration of Independence as a guide, Denvir argues, citizens can and should interpret the Constitution.²⁵ “[I]f the Constitution is seen as a blueprint for the American political community,” he says, “all citizens, not just

15. Marshall McLuhan, *Further Thoughts on Icons*, in *ICONS OF POPULAR CULTURE* 37 (Marshall Fishwick & Ray B. Browne eds., 1970).

16. DENVIR, *supra* note 2, at ix.

17. For an introduction to social contract theory, *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* (Ernest Parker ed., 1960).

18. See Gore Vidal, *The Second American Revolution*, in *THE UNITED STATES CONSTITUTION*, *supra* note 14, at 169.

19. See Herbert Aptheker, *On the Bicentennial and the Constitution: A Marxist View*, in *THE UNITED STATES CONSTITUTION*, *supra* note 14, at 249.

20. DENVIR, *supra* note 2, at ix.

21. *Id.* at 1.

22. U.S.C. XLIII (2000). I am thankful to Professor Lash LaRue of the Washington and Lee University School of Law for pointing this out to me. The four published organic laws are the Declaration of Independence (1776), the Articles of Confederation (1777), the Northwest Ordinance (1787), and the Constitution of the United States of America (1787).

23. See DENVIR, *supra* note 2, at 2.

24. *Id.* at 126.

25. *Id.* at x.

lawyers, must be involved in making it work.”²⁶ Citizens must ensure that the Constitution is followed and that it is administered faithfully. “We the People of the United States,”²⁷ to use the first words of the Constitution itself, have the responsibility to take our constitutional controversies to the courts, to urge our legislatures to fund projects in keeping with the Constitution’s promise, and more generally to look after the interests of the nation sketched out by the blueprint.

II. WHAT IS CONSTITUTIONAL LAW?

Having shared his understanding of the Constitution as a “blueprint,” Denvir is hardly finished theorizing about the Constitution. Like other constitutional law scholars, he has a preferred part of the Constitution and a preferred way of interpreting that part. While some scholars share Denvir’s fondness for the Fourteenth Amendment, few would embrace his emphasis on the Privileges and Immunities Clause in the first section of that amendment. Even fewer would be prepared to make it the centerpiece of constitutional law.

For Denvir, the Fourteenth Amendment and its Privileges and Immunities Clause are parts of the “second” Constitution.²⁸ The “first” Constitution is the document drafted during the summer of 1787 in Philadelphia and then ratified after tumultuous campaigns during 1787-88.²⁹ This Constitution replaced the unsuccessful Articles of Confederation and, in the opinion of most, brought to the nation a stronger national government. The “first” Constitution also, in the opinion of some, sanctioned slavery, weakened farmers’ relative power, and slowed the development of true democracy.³⁰ Charles A. Beard, in what remains even today one of the most debated works of American history, argued that commercial and property interests had directed the drafting of the Constitution and unduly profited from it.³¹

After the Civil War, the victorious North changed the Constitution by adding the Thirteenth, Fourteenth, and Fifteenth Amendments. These are the heart of the “second” Constitution. The Thirteenth Amendment eliminates slavery and other forms of involuntary servitude.³² The Fourteenth Amendment makes anyone born or naturalized in the United States a citizen of both the nation and a state and warns that the individual states may not deny the fundamental

26. *Id.*

27. U.S. CONST. pmbl.

28. DENVIR, *supra* note 2, at x.

29. *Id.* See generally RICHARD BEEMAN ET AL., BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (1987); THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (Bernard Bailyn ed., 1993).

30. See, e.g., John Patrick Diggins, *Class, Classical, and Consensus Views of the Constitution*, 55 U. CHI. L. REV 555 (1988).

31. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

32. U.S. CONST. amend. XIII, § 1.

national rights of citizens.³³ The Fifteenth Amendment says citizens' right to vote should not be denied because of race, color or earlier enslavement.³⁴ "The people who drafted those amendments believed they were necessary because the Civil War had shown the southern states unwilling to protect the fundamental rights of free men, black or white."³⁵

The most important of these amendments in *Denvir's* opinion is the Fourteenth.³⁶ Its five sections allow the courts to protect citizens against hostile state action and also authorize the Congress to take steps and spend monies which support the goals of the Fourteenth Amendment.³⁷ More specifically, the Fourteenth Amendment imposes three prohibitions on the states.³⁸ First, the amendment forbids any law that "shall abridge the privileges or immunities of citizens of the United States."³⁹ Second, states may not "deprive any person of life, liberty, or property, without due process of law."⁴⁰ And third, the states may not "deny to any person within its jurisdiction the equal protection of the laws."⁴¹

The amount of scholarship generated by the Due Process and Equal Protection Clauses is truly staggering, but, as noted previously, *Denvir* is unusual if not quite unique in emphasizing instead the Privileges and Immunities Clause. The chief reason other theorists and scholars have paid less attention to this clause is that it was eviscerated by the United States Supreme Court in the *Slaughterhouse Cases*,⁴² a decision handed down in 1873, only five years after ratification of the amendment. The litigation was prompted by a law passed by the carpetbag Louisiana legislature limiting the area in which New Orleans livestock might be slaughtered and providing that all the slaughtering should be done by one company.⁴³ Historians agree that the law was secured through the bribery of legislators, the governor, other state officials, and even two newspapers.⁴⁴ The effect of the law was virtually a monopoly, and "other New Orleans butchers were understandably outraged by this invasion of their occupational freedom."⁴⁵ The butchers turned to the Honorable John A. Campbell, a former justice of the Supreme Court and one of the most successful and prominent lawyers of his era.⁴⁶ Campbell argued that the Fourteenth

33. U.S. CONST. amend. XIV, § 1.

34. U.S. CONST. amend. XV, § 1.

35. *DENVIR*, *supra* note 2, at 5.

36. *Id.*

37. U.S. CONST. amend. XIV.

38. U.S. CONST. amend. XIV, § 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Slaughterhouse Cases*, 83 U.S. 36 (1873).

43. *See id.* at 36-43.

44. *See* BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 159 (1993).

45. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 118 (1960).

46. *Id.* at 119. In the era there was a saying in Louisiana: "Leave it to God and Mr. Campbell." *Id.*

Amendment had revolutionized the American constitutional system by extending national protection to the rights of man, including the right to occupational freedom.⁴⁷

The Court gave serious consideration to the argument, but in the end, five of the nine justices rejected it.⁴⁸ Writing for the majority, Justice Miller said the Privileges and Immunities Clause did not secure against state action the great rights which the Bill of Rights secured against federal action.⁴⁹ Instead, the clause referred only to a smaller, less grand set of rights such as freedom to travel from state to state, to use seaports, and to be protected on the high seas.⁵⁰

The effect of the opinion on the Privileges and Immunities Clause was devastating. According to the venerable constitutional law scholar Edward Corwin, the decision rendered the clause "a practical nullity."⁵¹ Alfred H. Kelly and Winfred A. Harbison found the interpretation "about as narrow a one as the Court could possibly extract from the language of the section. It came close to nullifying the apparent intent of the amendment."⁵² In *Denvir's* opinion, the decision "defies common sense."⁵³

Denvir does not discuss the matter, but the Supreme Court's reading of the Privileges and Immunities Clause also bewildered those who had actually drafted the amendment. The congressional debates on the Fourteenth Amendment indicate that its framers, especially Representative John Bingham and Senator Jacob Howard, placed particular emphasis on the clause, fully intending it to make something comparable to the Bill of Rights binding on the states.⁵⁴ Senator George F. Edmunds, another member of Congress and drafter of the Fourteenth Amendment, thought the Court's interpretation of the clause "radically differed in respect both to the intention of the framers and the construction of the language used by them."⁵⁵

In making his case for according greater substantive meaning to the Privileges and Immunities Clause, *Denvir* does note that the phrase "privileges and immunities" appears in Article IV of the Constitution.⁵⁶ *Denvir* also points to the often overlooked 1823 decision in *Corfield v. Coryell*,⁵⁷ which attempts to define the privileges and immunities protected by Article IV. According to Justice Bushrod Washington, who authored the opinion, the privileges and

47. *Id.*

48. *Slaughterhouse Cases*, 83 U.S. at 83.

49. *Id.* at 78-79.

50. *Id.* at 79.

51. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 965 (Edward S. Corwin ed., 1953).

52. ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 508 (1970).

53. *DENVIR*, *supra* note 2, at 6.

54. SCHWARTZ, *supra* note 44, at 159.

55. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 541 (1937).

56. *DENVIR*, *supra* note 2, at 7.

57. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

immunities at issue are those “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.”⁵⁸ This broad understanding, this attaching of significance to the phrase, Denvir says, is most likely what members of Congress had in mind when they drafted the Fourteenth Amendment.⁵⁹

Overall, Denvir’s emphasis on a particular part of the Fourteenth Amendment is less idiosyncratic than it is imaginative. His use of the Privileges and Immunities Clause is less deceptive than it is bold. He wants to discuss the possibility of a democracy for the pursuit of happiness, and he has chosen and established his vehicle for doing so.

III. WHAT IS CONSTITUTIONAL JUSTICE?

With his constitutional blueprint in hand and the Fourteenth Amendment’s Privileges and Immunities Clause circled in red, Denvir goes on in the bulk of *Democracy’s Constitution* to explain what American privileges and immunities should be. He points to the rights to earn a living, to receive a first-rate education, to have a voice that is heard, and to cast a vote that counts. These, in Denvir’s opinion, are substantive rights and therefore different than equal protection guarantees which are more comparative in nature.⁶⁰ He wants the courts to recognize and protect rights guaranteed by the Privileges and Immunities Clause, and he also offers suggestions about how the legislatures could also protect such rights through appropriate legislation and funding. If the courts and legislatures could truly extend and protect the rights discussed, citizens might in fact be better able to pursue happiness.

A. *Earning a Living*

Denvir begins his discussion of the right to earn a living by asserting that “[w]ork has always been an essential component of the American Dream”⁶¹ It then follows, according to his argument, that an inability to earn a living would constitute a significant deprivation, even a humiliation.⁶² He invokes the gripping image of the Joads and other Oakies in the novel *The Grapes of Wrath*.⁶³ These unfortunate souls flee the Dust Bowl for California, hoping desperately to find work and thereby shed their feelings of personal worthlessness. Had the Joads been familiar with the writings of Judith Shklar, they might have joined Denvir in quoting her: “We are citizens only if we ‘earn.’”⁶⁴

58. *Id.* at 551-52.

59. *See* DENVIR, *supra* note 2, at 7.

60. *See id.* at 8. The author does devote a chapter of his study to equal protections concerns. *See id.* at 108-24.

61. *Id.* at 33.

62. *Id.* at 33-34.

63. JOHN STEINBECK, *THE GRAPES OF WRATH* (1939).

64. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 67 (1991).

Denvir is of course correct about the importance of work and employment in our culture, and Americans should not be fired for arbitrary or biased reasons. However, Denvir's leap from work to gainful employment is a bit hasty. When we say someone is "out of work," we do not mean that person has no opportunity for work but rather that he or she has no relationship with another who controls and directs one's productive effort for pay.⁶⁵ Employment, in other words, has more to do with a socioeconomic relationship than with work itself.⁶⁶ Employment takes on a specialized meaning in the context of a capitalist economy, and, alas, it is more likely to be draining and exploitative than it is exhilarating and empowering.

The exploitativeness of employment is disguised by the Nineteenth Century "free labor" ideology which Denvir discusses and champions.⁶⁷ As he points out, the ideology achieved its greatest power at roughly the same time the Fourteenth Amendment was drafted, and the ideology was especially popular within the same Republican Party which was primarily responsible for the Fourteenth Amendment.⁶⁸ For free-labor ideologues, honest, sober, diligent labor led to independence. It produced a society of happy farmers, artisans and business proprietors.⁶⁹ However, during the same years in which the ideology took hold, more and more Americans settled into lives of wage labor in the industrial sector.⁷⁰ With corporate control of the sector increasing, the laborer did not have autonomy and independence. He or she was paid little, bossed around, and released when the employer chose. The powerful ideology of "free labor" obscured all this. We find the likes of George Pullman, who employed thousands in his railroad car plants, saying and apparently believing his relationship with each worker was a voluntary meeting of the minds.⁷¹ If workers perceived better opportunities elsewhere, he thought, they could simply terminate their employment contracts and move on.⁷²

The problem with Denvir's endorsement of a right to employment, in short,

65. Think, for example, of homemakers. Surely they have a great deal of productive work to do, but since they do not have a formal employment relation for pay, we often characterize them as "not working."

66. See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 282 (1976).

67. DENVIR, *supra* note 2, at 34.

68. *Id.*

69. Works exploring the free-labor ideology include but are not limited to: ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (2d ed. 1995) (1970); JONATHAN A. GLICKSTEIN, *CONCEPTS OF FREE LABOR IN ANTEBELLUM AMERICA* (1991); ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991).

70. See Richard Oestreicher, *Labor: The Jacksonian Era Through Reconstruction*, in 2 *ENCYCLOPEDIA OF AMERICAN SOCIAL HISTORY* 1447 (Mary Kupiec Cayton et al. eds., 1993).

71. See DAVID RAY PAPKE, *THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA* 15 (1999).

72. *Id.*

is not its fit within the protections of the Privileges and Immunities Clause. Denying workers their chosen way to earn a living, as was the case with New Orleans butchers in the *Slaughterhouse Cases*,⁷³ could have been seen as a violation of constitutional rights. Arbitrary twentieth-century dismissals of workers could also be seen as violations of the Fourteenth Amendment's substantive promises. But in a capitalist context, how likely is it that employment will be the foundation of happiness? How much of our "constitutional hope,"⁷⁴ as Denvir calls it, should be invested here?

B. A First-Rate Education

Denvir admits at the start of his discussion regarding the right to a first-rate education that the drafters of the Fourteenth Amendment could not have had this right in mind.⁷⁵ This contrasts with the previously discussed right to earn a living which, given the drafters' subscription to a "free-labor ideology," could have been envisioned under the "privileges and immunities" rubric and which four of the nine justices in the *Slaughterhouse Cases* seem to have accepted.⁷⁶ In the area of education, however, only northern whites had access to free public schools by the 1870s, and many members of even that part of the population did not take advantage of the free educational opportunities for religious and/or financial reasons.⁷⁷

In the South . . . the existence of slavery generated some nervousness about widespread popular education, even for poor whites. The northern middle-class program of property taxes to support free public schooling was not adopted in the South until the end of the nineteenth century, and then only within the context of separate and unequal schools for black children.⁷⁸

Hence, Denvir must look not to a plausibly preexisting interpretation of the Privileges and Immunities Clause but rather to a sense that it is a "dynamic concept."⁷⁹ He seconds John Hart Ely,⁸⁰ who has argued that "privileges and immunities" was an intentionally abstract and dramatic phrase.⁸¹ The framers hoped and believed that later generations would imbue the phrase with more precise content. Were they alive today, argue Ely and Denvir, the framers of the amendment would agree that the right to an education should be a fundamental

73. 88 U.S. 36 (1872).

74. See DENVIR, *supra* note 2, at 127.

75. See *id.* at 51-52.

76. See *Slaughterhouse Cases*, 83 U.S. 36 (1873).

77. Carl F. Kaestle, *Public Education*, in 3 *ENCYCLOPEDIA OF AMERICAN SOCIAL HISTORY* 2495 (Mary Kupiec Cayton et al. eds., 1993).

78. *Id.* at 2496.

79. DENVIR, *supra* note 2, at 52.

80. See *id.* at 7-8.

81. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 28 (1980).

privilege of the American citizenry.

When Denvir looks for support from the bench, he finds nothing less than the almost sacred *Brown v. Board of Education*.⁸² He interprets *Brown* as promising each American child an education as a privilege of national citizenship,⁸³ and he relies especially on Chief Justice Earl Warren's statement that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."⁸⁴ While commending Denvir for his spirited reading of dictum from the opinion, others might choose to read *Brown* as primarily an equal protection pronouncement, that is, an indictment of inequality rather than the articulation of a substantive right.

Be that as it may, Denvir is not finished, and the most interesting feature of this treatment of a right to education is his concomitant insistence that such education be "first-rate."⁸⁵ He defines "a first-rate education" as "one that permits the student to compete successfully in the economic marketplace and to effectively participate in the governance of our democracy."⁸⁶ Sadly, many American children receive educations which fail to meet this standard. Although class is often "coded" by race in contemporary United States, the chief dividing line in the education sector is actually class itself. A disproportionate percentage of American working-class and underclass children receive something inferior to even "second" or "third-rate education." If there was in fact a recognized right to "first-rate education" under the Privileges and Immunities Clause, lawsuits could be successfully brought against the state and local sponsors of public education. Denvir has a steady read on the problem, and the constitutional law scholar within him proposes a way to attack.

C. Political Speech

Denvir launches his discussion of enhanced political speech rights by pointing out there is "no realistic chance" that Congress and the state legislatures would support what he has championed regarding employment and education.⁸⁷ What can a person do about this apparent roadblock? "Instead of despairing about the wrongheadedness of the current political system," he states, "I say let's reform it."⁸⁸ In particular, let's enhance political speech rights in hopes of creating richer political dialogue and, ultimately, desirable action. Denvir is like the apple for which one might bob in a barrel of water. You might for a moment knock him under, but he immediately bounces back to the surface.

As in prior discussions, Denvir argues that a reconceptualization of extant

82. 347 U.S. 483 (1954).

83. See DENVIR, *supra* note 2, at 56.

84. *Id.* at 54 (quoting *Brown*, 344 U.S. at 493).

85. See DENVIR, *supra* note 2, at 56.

86. *Id.* at 57.

87. *Id.* at 72.

88. *Id.* at 73.

constitutional law is crucial.⁸⁹ The present law, in his opinion, is unfortunately influenced by Justice Oliver Wendell Holmes, who derived his understanding of freedom of speech from the thought of John Milton and John Stuart Mill.⁹⁰ Holmes took to heart Milton and Mill's insistence that a free and open exchange of ideas is necessary for freedom and social development,⁹¹ and he thought the Bill of Rights enshrined freedom of speech as its core principle.⁹² In his famous dissent in *Abrams v. United States*, he articulated a metaphor which has endured: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"⁹³

Before long Holmes' dissenting views became dominant, and for decades courts have referred to his marketplace metaphor when considering alleged violations of freedom of speech. Courts exercise great scrutiny when the government attempts to interfere with the exchange of ideas by suppressing speech. However, if the government unintentionally interferes with speech in order to advance some other policy goal, the courts tend to exercise much less scrutiny. A Supreme Court ruling such as *Clark v. Community for Creative Non-Violence*⁹⁴ can result. In *Clark*, a non-profit group sought permission to set up a tent city in Lafayette Park in Washington, D.C., in order to dramatize the plight of the homeless.⁹⁵ The National Park Service denied their request, reasoning that the tents would violate park rules against camping.⁹⁶ The Supreme Court, in turn, supported the National Park Service, saying the Service's goal was to protect grass and bushes and not to suppress political speech.⁹⁷

Presumably, a travesty of this sort would not have occurred if a genuine right to speak out had been recognized under the Privileges and Immunities Clause of the Fourteenth Amendment. Holmes' metaphor and its extension do not help, but in Denvir's interpretation, Justice Louis Brandeis might be a guide.⁹⁸ Denvir quotes Brandeis' famous concurrence in *Whitney v. California*:⁹⁹ "[T]he greatest menace to freedom is an inert people. . . ."¹⁰⁰ Brandeis thought that public discussion was a duty and that the government had to protect political speech at all cost in order to insure the process of democratic deliberation.¹⁰¹ This is a more aggressive, affirmative stance than the Holmesian view which bars only

89. *See id.* at 77.

90. *See* SCHWARTZ, *supra* note 44, at 221.

91. *See id.* at 220.

92. *See* FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 78-79 (Atheneum 1965) (1938).

93. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

94. 468 U.S. 288 (1984).

95. *Id.* at 291-92.

96. *Id.* at 292.

97. *Id.* at 299.

98. *See* DENVIR, *supra* note 2, at 77.

99. 274 U.S. 357 (1927).

100. *Id.* at 375, (Brandeis, J., concurring).

101. *Id.*

government attempts to suppress speech.

Beyond protecting speech in the public forum, Denvir also uses his enhanced right of political speech as a basis for addressing the sorry state of campaign contribution and campaign spending law.¹⁰² Denvir is especially critical of the Supreme Court's decision in *Buckley v. Valeo*,¹⁰³ which found meaningful campaign financing reform unconstitutional because it would violate the free speech rights of large spenders.¹⁰⁴ "The worst part of *Buckley v. Valeo*[,] " Denvir says, "is its cavalier dismissal of the statute's goal of furthering political equality between citizens."¹⁰⁵ The decision to invoke freedom of speech in order to enable the rich to use their money to dominate elections strikes Denvir "as the low point in modern American constitutional law."¹⁰⁶

Denvir's enhanced right to political speech, a right moored in the Privileges and Immunities Clause, would produce a quite different result in *Buckley*. Limits on campaign contributions, in his opinion, do not limit speech.¹⁰⁷ To the contrary, limiting the amount the rich might contribute "furtheres the goal of ensuring that all citizens have a realistic chance to be heard."¹⁰⁸ *Buckley* should be overruled, and, furthermore, "[t]he only effective solution is to insulate candidates from this insidious influence and require public financing of elections."¹⁰⁹

D. A Vote That Counts

The fourth major right that Denvir thinks should be guaranteed by the Fourteenth Amendment's Privileges and Immunities Clause is the right to a meaningful vote.¹¹⁰ As with his rights to a first-rate education and political speech, Denvir admits the right to a vote that was not a fundamental right imagined by the drafters of the Fourteenth Amendment.¹¹¹ The drafters were able to imagine a voting right for only *male* former slaves, a decision that greatly angered Elizabeth Cady Stanton, Susan B. Anthony, and other leaders of the Nineteenth Century women's rights movement. Not only radical Republicans in the Congress but also some of Cady Stanton's former colleagues in abolitionist circles thought the new guarantee of voting rights should not be extended to women.¹¹² When Cady Stanton refused to grant voting rights for freed male

102. DENVIR, *supra* note 2, at 80.

103. 424 U.S. 1 (1976).

104. *See id.* at 143-44.

105. DENVIR, *supra* note 2, at 85.

106. *Id.* at 86.

107. *Id.* at 87.

108. *Id.* at 87.

109. *Id.* at 88.

110. *Id.* at 91.

111. *Id.*

112. *See* DAVID RAY PAPKE, HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH 68 (1998).

slaves priority over voting rights for women, the great abolitionist William Lloyd Garrison exploded.¹¹³ He called her a “female demagogue,” who was “untruthful, unscrupulous and selfishly ambitious.”¹¹⁴

Denvir has little to say about this unfortunate disagreement, and indeed, throughout the book, he rarely discusses women’s rights under his preferred “privileges and immunities” rubric.¹¹⁵ Instead, Denvir reiterates that the term “privileges” must be taken as “a dynamic term.”¹¹⁶ That is, he suggests that subsequent interpreters of the term can add to it.¹¹⁷ “It is axiomatic in a democracy,” he states bluntly, “that adult citizens should have the right to vote.”¹¹⁸

So be it, one might say. The Nineteenth Amendment finally gave to women the right to vote,¹¹⁹ which drafters of the Fourteenth Amendment could not countenance. In addition, during the 1960s, the Supreme Court articulated and applied to the states the “one man, one vote” principle. For example, in *Baker v. Carr*,¹²⁰ the Supreme Court held that the federal courts were competent to entertain challenges to the woefully out-of-date systems of state legislative apportionment.¹²¹ Likewise, in *Reynolds v. Sims*,¹²² the Court, holding that both houses of a bicameral state legislature must be apportioned on a population basis, laid down an equal population principle.¹²³ “Chief Justice Warren himself characterized the reapportionment cases as the most important cases decided by the Court during his tenure.”¹²⁴ Constitutional law scholars Alfred H. Kelly and Winfred A. Harbison assert that because of these decisions “one man, one vote” became “virtually a pure and intractable rule.”¹²⁵

Nevertheless, Denvir remains dissatisfied. His chief complaint involves the continuing gerrymandering of American political districts.¹²⁶ Congress has attempted to address the racial aspects of this gerrymandering through the 1982 Voting Rights Act and its subsequent amendments,¹²⁷ but in Denvir’s opinion this

113. *Id.* at 69.

114. ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* 119 (1984) (quoting William Lloyd Garrison).

115. The author does briefly discuss women’s rights in his chapter on equal protection. *See* DENVIR, *supra* note 2, at 122-23.

116. *Id.* at 91.

117. *Id.* at 8.

118. *Id.*

119. U.S. CONST. amend. XIX, § 1.

120. 369 U.S. 186 (1962).

121. *Id.* at 237.

122. 377 U.S. 533 (1964).

123. *Id.* at 577.

124. *See* SCHWARTZ, *supra* note 44, at 279.

125. KELLY & HARBISON, *supra* note 52, at 1022.

126. DENVIR, *supra* note 2, at 92.

127. *See id.* at 106.

legislation "gives relief only to racial minorities, ignoring other citizens."¹²⁸ The drawing of political district lines favors incumbents, the two entrenched parties, and the existing balance of power. Many Americans, in Denvir's view, are left with votes which do not really count for much.¹²⁹

His point is well taken, and the gerrymandering of American political districts must surely be a factor in the centrist stagnation of American politics. American citizens are entitled to vote, but often their choices range only from A to B. Stability and national unity are arguable benefits, but political alienation and apathy are two of the costs.

Denvir's solution to the problem is a system of proportional representation, and in the final stages of his discussion he abandons an attempt to work within existing constitutional law arguments and instead puts forward various policy arguments.¹³⁰ Congress, he admits, could not change the elections for the presidency and the Senate because of precise constitutional prescriptions. However, Congress does have the power, in Denvir's opinion, to develop some form of proportional representation election for the House of Representatives.¹³¹ In addition, he suggests that individual states could amend their constitutions to adopt proportional representation for state elections.¹³² "The major obstacle to the adoption of PR is really the opposition of the two major parties, which rightly fear the openness of proportional representation to third parties."¹³³

CONCLUSION

While the scholar Sanford Levinson suggests the "'death of constitutionalism' may be the central event of our time,"¹³⁴ Denvir finds a way within the constitutional law discourse to propose thoughtful and sometimes stirring solutions for serious societal problems. He shows us the ongoing potential of that discourse to prompt and shape powerful understandings of democracy. Even in a time of alienation and uncertainty, he refuses to treat the Constitution and also law in general as contingent and inevitably biased. Denvir takes the Constitution seriously in his own life, and he demonstrates how we might benefit by doing the same.

This is not to say, meanwhile, that the four substantive rights Denvir finds within the Privileges and Immunities Clause of the Fourteenth Amendment will be endorsed by judges and legislators. It may be some time before the rights to earn a living, to receive a first-rate education, to engage in political speech, and to cast meaningful votes are recognized. In addition to acknowledging predictable opposition to some of Denvir's proposals, we should also note that

128. *Id.* at 104.

129. *Id.*

130. *Id.* at 104-07.

131. *Id.* at 104.

132. *Id.*

133. *Id.* at 107.

134. LEVINSON, *supra* note 13, at 52.

wartime has not traditionally been the time for expanding and extending constitutional rights. But Denvir also reminds readers of *Democracy's Constitution* that he is proposing more than a novel reading of a phrase in the Constitution. "The title of the book is actually a play on words,"¹³⁵ Denvir says. "*Democracy's Constitution* is really an inquiry into what constitutes American democracy."¹³⁶ What are the principles that distinguish the United States as a political culture? Denvir's answer is that "democracy requires the guarantee to all its citizens of a realistic opportunity to pursue happiness as they define it."¹³⁷

This position is neither pretentious nor naive. Denvir is honest when he says he wants average citizens as well as legal professionals to be able to read his book, and he writes with simple terms in a straightforward way. He realizes that his interpretations and proposals will strike some as "utopian,"¹³⁸ but he takes optimism to be preferable to the self-impressed cynicism which has become so common among legal academics. Consider what I am suggesting, Denvir says, and I think you will see how we might develop a fuller and more empowering democracy.

135. DENVIR, *supra* note 2, at 125.

136. *Id.*

137. *Id.* at 126.

138. *Id.*

NOTES

THE DEVELOPMENT OF THE UNDUE BURDEN STANDARD IN *STENBERG v. CARHART*: WILL PROPOSED RU-486 LEGISLATION SURVIVE?

HILARY GUENTHER*

INTRODUCTION

On June 28, 2000, the U.S. Supreme Court ruled on yet another divisive facet of the abortion issue. In *Stenberg v. Carhart*,¹ the Court held that a Nebraska statute banning partial-birth abortions was unconstitutional.² In its analysis, the Court applied the undue burden test from *Planned Parenthood v. Casey*³ and concluded that the Nebraska statute placed a substantial obstacle in the path of a woman seeking to terminate her pregnancy.⁴

The *Carhart* decision marks the Court's first direct application of the *Casey* holding, which dramatically revamped abortion analysis in 1992. The *Casey* Court abandoned the rigid trimester framework set forth in *Roe v. Wade*⁵ in favor of the undue burden standard.⁶ The Court viewed the standard as a compromise between state interests in regulating abortion and the fundamental rights of women to choose to terminate a pregnancy.⁷ The Court determined that a state could regulate previability abortion procedures provided that the state had a compelling interest and that the regulation did not unduly burden the woman's right to choose.⁸ On its face, the undue burden standard appeared to be a fair way to balance the competing interests. But in practice, the standard has proven to be vague, difficult to apply, and easily manipulated. The *Carhart* opinion provides an example of the difficulties presented by *Casey*'s undue burden standard.

This Note examines the *Carhart* opinion in detail, focusing on the individual

* J.D. Candidate, 2002, Indiana University School of Law—Indianapolis; B.A., 1999, DePauw University.

1. 530 U.S. 914 (2000).

2. *Id.* at 922.

3. 505 U.S. 833 (1992).

4. *Carhart*, 530 U.S. at 930, 945-46.

5. 410 U.S. 113 (1973).

6. *Casey*, 505 U.S. at 873-74.

7. *Id.* at 876.

8. *Id.* at 877-78.

viewpoints of the Justices who wrote the majority, concurring and dissenting opinions. Part I describes the development of the standards the Court has used to evaluate abortion legislation. The two central cases on this point are discussed: *Roe* and *Casey*. Part II focuses on the application of the undue burden standard to the "partial birth abortion" question presented in *Carhart*. Part III explores the criticisms surrounding the undue burden standard and the inconsistencies that exist between the spirit of the *Casey* decision and the application of the undue burden standard in *Carhart*. Finally, Part IV attempts to consolidate the lessons of *Casey* and *Carhart* and apply them to the current debate over the recently FDA-approved RU-486. This Note also assesses the constitutionality of proposed state and federal legislation designed to regulate and limit the drug's availability. Specifically, this Note addresses the constitutionality of the "RU-486 Patient Health and Safety Protection Act,"⁹ which is now before both houses of Congress, and the constitutionality of a similar proposed regulatory statute in Oklahoma.

I. THE STANDARDS: FROM *ROE* TO *CASEY*

The two primary cases setting forth the standards courts have used in evaluating abortion legislation are *Roe v. Wade*¹⁰ and *Planned Parenthood v. Casey*.¹¹ In *Roe*, the Court acknowledged that a woman's right to terminate her pregnancy is part of the fundamental right to privacy found in the Due Process Clause of the Fourteenth Amendment.¹² Under *Roe*, any state regulation that limited this right was subject to a heightened level of scrutiny.¹³ The Court acknowledged that the state had important and legitimate interests in regulating two areas, the health of the mother and the protection of potential life.¹⁴ These interests became compelling at different stages in the pregnancy.¹⁵ The state's

9. H.R. 482, 107th Cong. (2001).

10. 410 U.S. 113 (1973).

11. 505 U.S. 833 (1992).

12. *Roe*, 410 U.S. at 153. "This right of privacy [found] in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* Justice Rehnquist wrote a dissenting opinion in which he argued that a "right" to abortion should not be based on the Due Process Clause of the Fourteenth Amendment because the "right . . . was apparently completely unknown to the drafters of the Amendment." *Id.* at 174 (Rehnquist, J., dissenting). Justice Rehnquist noted that at the time the Fourteenth Amendment was adopted, "at least [thirty-six] laws [had been] enacted by state or territorial legislatures limiting abortion," suggesting that "[t]here apparently was no question concerning the validity of [these statutes] when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter." *Id.* at 175.

13. *Id.* at 154.

14. *Id.* at 163-64.

15. *Id.* at 162-63.

interest in protecting the health of the mother became “compelling” at the end of the first trimester.¹⁶ The Court stated that after this point, a state could regulate abortion procedures to the extent reasonably necessary to protect maternal health.¹⁷

Under the *Roe* scheme, the state’s interest in protecting potential human life did not become compelling until after fetal viability.¹⁸ The Court explained that at this point in the pregnancy “the fetus . . . presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of viable life after viability thus has both logical and biological justifications.”¹⁹ Thus, the Court found that a state could altogether prohibit abortion after a fetus reached viability, provided that legislation allowed for the procedure to be performed where it was necessary to preserve the life or health of the mother.²⁰ To guide states in their attempt to balance their interests with those of women seeking to terminate their pregnancies, the Court established a trimester framework:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.²¹

In 1992, the Supreme Court revisited the abortion issue in *Planned Parenthood v. Casey*.²² In this decision, the Court dramatically revamped the standards for evaluating the constitutionality of abortion legislation. Two factors contributed to this change in standards. First, by the time *Casey* was decided, the Court had lost all but one of the members who joined the majority in *Roe v. Wade* and gained new Justices with more socially conservative viewpoints.²³ Second,

16. *Id.* at 163.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 163-64.

21. *Id.* at 164-65.

22. 505 U.S. 833 (1992).

23. In 1973, the *Roe* Court consisted of Chief Justice Burger and Justices Douglas, Brennan, Powell, Stewart, White, Marshall, Blackmun, and Rehnquist. By 1992, when *Casey* was decided, the only remaining members were Chief Justice Rehnquist and Justices White and Blackmun. The remaining six seats were filled by Justices Stevens, O’Connor, Scalia, Kennedy, Souter, and Thomas.

Roe had come under sharp criticism that the application of its holding had created a system of "abortion on demand," where the state's interest in protecting the potentiality of human life had been all but forgotten in the battle to protect a woman's right to choose.²⁴ In *Casey*, the Court was presented with an opportunity to overturn *Roe*; instead, the Court sought to effectuate a compromise between a state's legitimate interest in regulating abortion and a woman's right to terminate her pregnancy.²⁵

The Pennsylvania statute at issue in *Casey* imposed regulations on abortions through informed consent, parental consent, spousal notification, and recording and record-keeping requirements.²⁶ In evaluating these provisions, the Court set forth a new guideline for determining the constitutionality of abortion legislation.²⁷ The Court reaffirmed the essential holding of *Roe*, but abandoned its rigid trimester framework stating that "[t]he trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*."²⁸ In its place, the Court adopted the "undue burden" standard, which allows a state to recognize its interests in the previability stages of a woman's pregnancy, provided that the regulation does not have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."²⁹ The Court emphasized what it saw as the essential holding of *Roe*: that a woman has a fundamental right to terminate her pregnancy before viability, and that a state has a legitimate interest in protecting the potentiality of human life and the health of the mother.³⁰ The Court retained the *Roe* notions that after the fetus reaches viability, a state may altogether prohibit abortion so long as a valid health exception is present in the statute, and that a state "may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."³¹

However, under *Casey*, states have the ability to regulate previability abortions provided that the regulation does not place an undue burden on a woman's right to choose.³² The Court gave little guidance on the subject of what

24. See *Casey*, 505 U.S. at 871. The *Casey* Court acknowledged that several cases decided after *Roe* gave too little weight to legitimate state interests in regulating abortion: "[I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.'" *Id.* at 871 (quoting *Roe*, 410 U.S. at 163). "That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Id.*

25. See *id.* at 869-79.

26. *Id.* at 844.

27. *Id.* at 877.

28. *Id.* at 873.

29. *Id.* at 877.

30. *Id.* at 877-78.

31. *Id.* at 879.

32. *Id.* Based on these standards, the Court determined that the informed consent, parental consent, and record-keeping portions of the Pennsylvania statute did not place an undue burden on

constitutes a “substantial obstacle in the path of a woman seeking an abortion,”³³ but the Court did note that a regulation designed to encourage a woman to choose *not* to terminate her pregnancy would be acceptable.

To promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.³⁴

The *Casey* decision does not reflect a unified consensus of the Court: the undue burden standard was set forth in a joint opinion authored by Justices O’Connor, Kennedy, and Souter. Justices Blackmun and Stevens concurred in part and dissented in part, taking issue with the plurality’s adoption of the undue burden standard. Justice Blackmun wrote:

Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman’s right to make her own reproductive decisions, free from state coercion. . . . The factual premises of the trimester framework have not been undermined, and the *Roe* framework is far more administrable, and far less manipulable, than the “undue burden” standard adopted by the joint opinion.³⁵

Further, he argued that the trimester system should be retained because “[n]o other approach has gained a majority, and no other is more protective of the woman’s fundamental right.”³⁶

Chief Justice Rehnquist, along with Justices White, Scalia, and Thomas, concurred in the judgment in part, but also dissented in part, maintaining that *Roe* should have been overturned.³⁷ In a separate opinion, Justice Scalia offered sharp criticism of the undue burden standard, stating that not only was the standard easily manipulated, but that it had no foundation in constitutional law: “The ultimately standardless nature of the ‘undue burden’ inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis.”³⁸

a woman’s right to choose to have an abortion. *Id.* at 881-87, 899-901. The spousal notification requirement, however, did create an undue burden because of the significant risk of spousal abuse that could arise if the woman was required to disclose her status to her husband. *Id.* at 887-98.

33. *Id.* at 878.

34. *Id.*

35. *Id.* at 930 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).

36. *Id.* at 934 (Blackmun, J., concurring in part and dissenting in part).

37. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part).

38. *Id.* at 987 (Scalia, J., concurring in part and dissenting in part).

II. APPLYING CASEY: *STENBERG V. CARHART*

A. *The Majority Opinion*

Casey's undue burden standard came under criticism once again in the latest U.S. Supreme Court case dealing with yet another controversial facet of the abortion issue: the "partial birth abortion" debate.³⁹ In *Stenberg v. Carhart*,⁴⁰ the Supreme Court invalidated a Nebraska statute banning "partial birth abortions" on the grounds that the statute placed an undue burden on a woman's right to choose and that the statute lacked a valid health exception.⁴¹ The majority found that the statute was broad enough to encompass the two most common types of second trimester abortion procedures.⁴² One of the procedures, the dilation and evacuation method, also known as "D & E," accounts for approximately ninety-five percent of second trimester abortions.⁴³ A D & E abortion generally involves "(1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the [fifteenth] week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal

39. The case decided the partial birth abortion issue, which Congress had attempted to handle several times. In June 1995, Congress introduced a bill designed to ban a type of partial birth abortion procedure. See Partial-Birth Ban Abortion Act of 1995, H.R. 1833, 104th Cong. (1995). Both houses passed the bill, but President Clinton vetoed it. H.R. 1833, 142 CONG. REC. D304 (1996). Two years later, Congress passed the Partial-Birth Abortion Ban Act of 1997, but President Clinton again vetoed it. See H.R. 1122, 105th Cong. (1997); 143 CONG. REC. H8892 (1997).

40. 530 U.S. 914 (2000).

41. *Id.* at 930.

42. *Id.* at 939-40. The Nebraska statute, in relevant part, stated: "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Id.* at 921-22 (quoting NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999)). The statute defined partial birth abortion: "an abortion procedure in which the person performing such abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." *Id.* (quoting NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999)). The statute further defined partial birth abortion as a procedure in which the person performs the abortion by "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for purposes of performing a procedure that the person performing the procedure knows will kill the unborn child and does kill the unborn child." *Id.*

43. *Carhart*, 530 U.S. at 924 (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE—UNITED STATES, 1996, at 41 (1999)). It is important to note that ninety percent of all abortions are performed during the first trimester utilizing the "vacuum aspiration" method. *Id.* at 923. The remaining ten percent generally occur during the second trimester (between twelve and twenty-four weeks), when vacuum aspiration is no longer an effective means of pregnancy termination due to the fetus' size. *Id.* at 924.

parts to facilitate evacuation from the uterus.”⁴⁴ Another second trimester procedure is the “D & X.”⁴⁵ The D & X involves the dilation of the cervix, and the removal of the intact fetus in one of two ways, depending upon the position of the fetus.⁴⁶ The D & E and D & X procedures involve collapsing the skull and evacuating its contents so that the entire fetal mass can pass through the cervix.⁴⁷ The State of Nebraska argued that the statute was intended to ban only the more controversial D & X procedure, not the more commonly employed D & E procedure.⁴⁸

Before evaluating Nebraska’s statute, the majority opinion began by reiterating the *Casey* analysis. The Court acknowledged that a woman has a constitutional right to terminate her pregnancy, and that a state has interests in protecting the health of the mother and the potentiality of human life.⁴⁹ The Court stated that it would apply the undue burden test to evaluate Nebraska’s statute.⁵⁰ If the statute placed an undue burden on a woman’s right to terminate her pregnancy in the previability stages, the statute would be declared unconstitutional.⁵¹ The Court also emphasized the importance of the health exception requirement in abortion-regulating legislation: “Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.”⁵²

With this framework in mind, the Court declared Nebraska’s statute unconstitutional.⁵³ With respect to its invalidation on health exception grounds,

44. *Id.* at 925 (citing W. HERN, ABORTION PRACTICE 146-56 (1984) and M. PAUL ET AL., A CLINICIANS GUIDE TO MEDICAL AND SURGICAL ABORTION 133-35 (1999)).

45. The Court also refers to a procedure known as the “intact D & E.” *Id.* at 927. Although there are technical differences between the intact D & E and the D & X (also known as the dilation and extraction method) both procedures involve the vaginal removal of an intact fetus, as opposed to the D & E method which involves the vaginal removal of dismembered fetal parts. *Id.* at 927-28 (citations omitted). The Court thus uses “D & X” and “intact D & E” interchangeably. *Id.* (citations omitted). For the purposes of this Note, reference to the D & X procedure encompasses both the D & X and intact D & E procedures.

46. *Id.*

47. *Id.*

48. *Id.* at 938-39. The D & X procedure is the more controversial of the two because, according to some, it more closely resembles infanticide. *Id.* at 1006-07 (Thomas, J., dissenting). Justice Thomas quoted the statement of a nurse who observed the performance of a D & X: “The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out . . .” *Id.* at 1007 (quoting *Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary*, 104th Cong. 18 (1995) (statement of Brenda Pratt Shafer)).

49. *Carhart*, 530 U.S. at 921.

50. *Id.*

51. *Id.*

52. *Id.* at 930.

53. *Id.* at 929-30.

the Court found that the "health exception" language⁵⁴ found in the statute was insufficient to truly protect a woman's right to an abortion.⁵⁵ Based on the record, the Court found that there was evidence that the D & X would, at times, be the safest form of second trimester abortion.⁵⁶ The standard for drafting an acceptable health exception is that the procedure must be permitted when "it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother," for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion."⁵⁷ The Court further stated that "a State cannot subject women's health to significant risks [where the pregnancy itself creates a threat to the mother's health], *and also* where state regulations force women to use riskier methods of abortion."⁵⁸ Thus, the possibility that the D & X procedure might be safer for some women than the D & E procedure requires that a woman should have access to the D & X when it is, in fact, the safest abortion procedure for her, as determined by her physician.⁵⁹

After determining that the statute was unconstitutional due to its lack of a valid health exception, the Court turned to the undue burden analysis. The Court found that the language of the statute was broad enough to impose a ban on both the D & E and D & X procedures:

Even if the statute's basic aim is to ban D & X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D & E and D & X—though it would have been a simple matter, for example, to provide an exception for the performance of D & E and other abortion procedures.⁶⁰

The effect of such an interpretation meant that the statute severely constrained a woman's right to obtain a second trimester abortion:

54. See *supra* note 42.

55. *Carhart*, 530 U.S. at 930-31.

56. *Id.* at 932-38.

57. *Id.* at 931 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)) (citation omitted); see also *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

58. *Carhart*, 530 U.S. at 931 (emphasis in original).

59. See *id.* at 937-39. "[W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* at 938 (quoting *Casey*, 505 U.S. at 879). In determining that the D & X may be a safer procedure in some instances than the D & E, the Court pointed to the fact that the D & X poses less of a risk to woman's health because fewer "passes" with sharp instruments need to be made in the woman's uterus in the D & X procedure, thus lessening the risk of uterine perforation and infection. *Id.* at 936.

60. *Carhart*, 530 U.S. at 939.

[U]sing this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.⁶¹

Thus, the Nebraska statute was found unconstitutional on the basis of an insufficient health exception and because the statute placed an undue burden in the path of a woman seeking a second trimester abortion.⁶²

B. The Concurrences

Casey's undue burden standard was followed and applied, but not without criticism from six members of the Court. Although Justices Stevens and Ginsburg concurred in the result, Justice Stevens' concurrence, joined by Justice Ginsburg, illustrated the concern that the undue burden standard could limit a woman's right to an abortion in a manner inconsistent with the Fourteenth Amendment:

[T]he word "liberty" in the Fourteenth Amendment includes a woman's right to make this difficult and extremely personal decision[,] mak[ing] it impossible . . . to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.⁶³

Additionally, Justice Stevens did not agree that a state's interest in protecting the potentiality of human life could be served effectively by banning one second trimester procedure but not the other: "For the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more

61. *Id.* at 945-46. It is important to note that although the D & E and the D & X are the most common and safest forms of second trimester abortions, other forms have been used, such as a labor-inducing procedure that involves the injection of saline into the uterus. *See id.* at 924 (citing CTRS. FOR DISEASE CONTROL PREVENTION, ABORTION SURVEILLANCE—UNITED STATES, 1996, at 8 (1999)).

62. It is significant that at the time of this decision, thirty states had statutes similar to the one at issue in *Carhart*. Richard W. Garnett, *The Courts and Abortion, if the Supreme Court Overturns Nebraska's Ban on Partial-birth Abortion, the Rationale Could Be Even Scarier Than the Decision*, THE WKLY. STANDARD, June 12, 2000, at 23. Immediately following the decision, statutes prohibiting "partial birth abortions" were struck down in several states, including Louisiana (*see Causeway Med. Suite v. Foster*, 221 F.3d 811 (5th Cir. 2000)); New Jersey (*see Planned Parenthood v. Farmer*, 220 F.3d 127 (3rd Cir. 2000)); Ohio (*see Women's Med. Prof'l Corp. v. Taft*, 162 F. Supp. 2d 929 (S.D. Ohio 2001)); and Virginia (*see Richmond Med. Ctr. for Women v. Gilmore*, 224 F.3d 337 (4th Cir. 2000)).

63. *Carhart*, 530 U.S. at 946 (Stevens, J., concurring).

akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other is simply irrational."⁶⁴ Thus, he implied that there is no room for states' interests in regulating previability abortions, even though the undue burden standard provides for courts to take those interests into account.⁶⁵

Justice Ginsburg, in a concurring opinion joined by Justice Stevens, stated that the Nebraska statute was designed to chip away at the rights protected by *Roe v. Wade* and modified by *Casey*.⁶⁶ Her concurrence endorsed a restatement of the undue burden standard as formulated by Chief Judge Posner of the Seventh Circuit: "[I]f a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."⁶⁷

Justice O'Connor's concurrence sought to clarify the positions set forth in the majority opinion and defended the *Casey* undue burden standard.⁶⁸ Although the Nebraska statute offered language resembling a "health exception," Justice O'Connor reiterated the point that it was not broad enough to adequately protect a woman's right to choose:

Because even a postviability proscription of abortion would be invalid absent a health exception, Nebraska's ban on previability partial-birth abortions, under the circumstances presented here, must include a health exception as well, since the State's interest in regulating abortions before viability is "considerably weaker" than after viability. The statute at issue here, however, only excepts those procedures "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury." This lack of a health exception necessarily renders the statute unconstitutional.⁶⁹

With respect to the undue burden standard, she stated that banning both the D & E and the D & X procedures placed an undue burden on a woman's ability to choose to terminate her pregnancy.⁷⁰ She then took the analysis one step further, offering guidance to states that may wish to proscribe a particular method of partial birth abortion:

If there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D & X procedure alone would "amount in practical terms to a substantial obstacle to a woman seeking an abortion." Thus, a ban on partial-birth

64. *Id.* at 946-47 (Stevens, J., concurring).

65. *See id.* (Stevens, J., concurring).

66. *Id.* at 951-52 (Ginsburg, J., concurring).

67. *Id.* at 952 (Ginsburg, J., concurring) (quoting *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, C.J., dissenting)).

68. *See id.* at 947 (O'Connor, J., concurring).

69. *Id.* at 948 (O'Connor, J., concurring) (citations omitted).

70. *See id.* (O'Connor, J., concurring).

abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.⁷¹

C. The Dissents

In his dissent, Justice Scalia sharply criticized the *Carhart* majority opinion. He began by expressing his wish that this case someday be placed in the same category as *Korematsu v. United States*⁷² and *Dred Scott v. Sanford*.⁷³ He stated that this case represents a valid application of *Casey*'s undue burden standard,⁷⁴ but pointed out that the standard represents nothing more than the value judgments of the Justices.⁷⁵ In so doing, he ultimately criticized the foundation of *Casey*:

In the last analysis, my judgment that *Casey* does not support today's tragic result can be traced to the fact that what I consider to be an "undue burden" is different from what the majority considers to be an "undue burden"—a conclusion that can not be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects . . . the life of a partially delivered fetus, and how much one respects . . . the freedom of the woman who gave it life to kill it.⁷⁶

In contrast, Justice Kennedy's dissenting opinion, joined by Chief Justice Rehnquist, suggests that the undue burden standard may be a workable test; however, he believed that the court misapplied *Casey*'s holding.⁷⁷ Justice Kennedy stated that "[t]he Court's decision . . . invalidat[es] a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon that right. The Nebraska statute 'expresse[d] a profound and legitimate respect for fetal life,' and left open several other avenues for women seeking to obtain abortions—the ban did not mean that women could not obtain abortions, but merely that they could not obtain a specific type of procedure."⁷⁸ According to Justice Kennedy, *Casey* explicitly authorized states to use the legislative process in order to display moral concerns; such an expression is not unconstitutional so long as the woman's right

71. *Id.* at 951 (O'Connor, J., concurring) (quoting *Casey*, 505 U.S. at 884 (citation omitted)).

72. 323 U.S. 214 (1944).

73. 60 U.S. 393 (1857). Both *Korematsu* and *Dred Scott* are now viewed as two of the Court's most infamous missteps.

74. *Carhart*, 530 U.S. at 953 (Scalia, J., dissenting).

75. *Id.* at 954-55 (Scalia, J., dissenting).

76. *Id.* (Scalia, J., dissenting).

77. *See id.* at 957 (Kennedy, J., dissenting).

78. *Id.* at 956-57 (Kennedy, J., dissenting).

to choose is not unduly hampered.⁷⁹ In this instance, a woman's right to choose was not unduly hampered because the language of the Nebraska statute clearly operated to ban only the D & X procedure.⁸⁰ "The legislation is well within the State's competence to enact."⁸¹ Justice Kennedy also argued that the rules of statutory construction would show that the statute was meant to apply to only the more gruesome and disturbing D & X procedure, not the D & E procedure.⁸² He emphasized the point that according to *Casey*, states have a valid interest in expressing concern for unborn life.⁸³ States also have an interest in forbidding medical procedures that may cause the medical profession to become disdainful of life.⁸⁴ Thus, according to Justice Kennedy, Nebraska had the right to draw a moral distinction between the two procedures and prohibit the more gruesome D & X.⁸⁵ In his view, simply because the D & E is also a disturbing procedure does not mean that the state accomplishes nothing in banning the D & X: "D & X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect."⁸⁶

Justice Kennedy then criticized the "health exception" ground for invalidating the statute, stating that giving physicians the broad latitude to escape application of a statute simply by exercising "medical judgment" would in effect vitiate the legislature's purpose in enacting the statute: "Requiring Nebraska to defer to [the physician's] judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now [the physician] who sets abortion policy for the State of Nebraska, not the legislature or the people."⁸⁷

Justice Thomas also disliked this case's application of the standards set forth in *Casey*. Joined by Chief Justice Rehnquist and Justice Scalia, he began by stating that *Casey*'s undue burden standard has no constitutional roots and is not the appropriate standard for determining the constitutionality of abortion legislation.⁸⁸ Thomas continued that, even if the undue burden standard must be applied, the Court misapplied it in this instance.⁸⁹ Justice Thomas maintained that majority ignored the rules of statutory construction: "The majority . . . reject[ed] the plain language of the statutory definition, refuse[d] to read that definition in light of the statutory reference to 'partial birth abortion,' and

79. See *id.* at 979 (Kennedy, J., dissenting).

80. See *id.* at 989-97 (Kennedy, J., dissenting).

81. *Id.* (Kennedy, J., dissenting).

82. See *id.* at 973-77 (Kennedy, J., dissenting).

83. *Id.* at 961 (Kennedy, J., dissenting).

84. *Id.* at 961-62 (Kennedy, J., dissenting).

85. *Id.* at 962 (Kennedy, J., dissenting).

86. *Id.* at 963 (Kennedy, J., dissenting).

87. *Id.* at 965 (Kennedy, J., dissenting).

88. *Id.* at 982 (Thomas, J., dissenting).

89. *Id.* at 982-83 (Thomas, J., dissenting).

ignore[d] the doctrine of constitutional avoidance.”⁹⁰ Furthermore, Justice Thomas assumed that states have an interest in regulating or banning the D & X procedure. He relied on the detailed and graphic description of the procedure⁹¹ to make his point: “The question whether States have a legitimate interest in banning the procedure does not require additional authority.”⁹² Thus, because the statute did not prohibit the D & E procedure and the state had an obvious compelling interest in banning the D & X, there was no undue burden on the woman’s ability to choose abortion.⁹³

III. THE UNDUE BURDEN STANDARD: THE LESSONS OF *CASEY* AND *CARHART*

The undue burden standard, as set forth in *Casey* and applied in *Carhart*, has been criticized sharply not only by individual members of the U.S. Supreme Court, but also by legal scholars on both sides of the abortion issue. Conservative, pro-life activists have stated that the undue burden standard is unworkable and too easily manipulated by the judges who apply it, thus limiting states’ abilities to express their interests in fetal life.⁹⁴ They take the position that it is a vague standard that calls for judicial value judgments rooted in ethics rather than law.⁹⁵ Pro-choice activists are also critical of the standard. Many take the position that the undue burden standard as presented in *Casey* represents an attempt by moderates and conservatives to chip away at a woman’s fundamental right to choose how to terminate her pregnancy.⁹⁶

However, the undue burden standard is not without its supporters. Some commentators applaud the standard as a reasonable compromise between the interests of women and the states. They note that *Casey*’s undue burden standard presents an opportunity for states to express their interests and ensures that women can make fully informed choices, thus encouraging their informed consent to the procedure.⁹⁷ Some argue that the *Casey* standard encourages political speech and allows the state to help women “structure” their decision-making process.⁹⁸

In trying to reconcile the lessons of *Casey* and *Carhart*, it is difficult to predict what types of regulations the Court will strike down in the future. It is important to note that the *Carhart* opinion did not present a united court. Rather, it was a 5-4 decision in which the *Casey* undue burden standard was criticized by

90. *Id.* at 997 (Thomas, J., dissenting).

91. *See supra* note 48.

92. *Carhart*, 530 U.S. at 1007 (Thomas, J., dissenting) (internal citation omitted).

93. *See id.* at 1005-06 (Thomas, J., dissenting).

94. Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 295 (1995).

95. *Id.*

96. *Id.*

97. Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 797 (1996).

98. *See id.*

a majority of the Justices, suggesting that the issue of how to evaluate abortion regulations will continue to be contentious. Most scholars have interpreted *Casey* as an affirmation or recognition of states' interests in protecting the health of the mother and the potential life of the unborn fetus.⁹⁹ However, as commentators have pointed out, the *Casey* Court failed to firmly set forth a set of state interests that would justify interference with a woman's right to choose: "One might expect that before the Court would so fundamentally depart from traditional due process analysis, it would have a firm grasp of the state interest that led it to do so. But the *Casey* opinion contains many conclusions with little analysis."¹⁰⁰

The *Carhart* majority decision does little to clarify the situation. An attempted synthesis of the *Casey* and *Carhart* decisions suggests that the Court acknowledges that states have a compelling interest in protecting fetal life. However, an examination of the majority opinion shows that the Justices gave little weight to Nebraska's interest. The Court simply stated in a somewhat conclusory fashion that the statute placed an undue burden on a woman's right to choose.¹⁰¹ The Court also failed to present states with any guidance on how to draft legislation that expresses their interests without placing an undue burden on a woman's right to choose. The Stevens concurrence suggests that there is absolutely no valid state interest that can justify regulating previability abortions.¹⁰² Justice O'Connor's concurrence offers a little help, stating that a statute that banned just one and not both of the second trimester procedures would be constitutional.¹⁰³

On the other hand, it is important to remember that the holding of *Casey* mandates that courts give at least some weight to state interests in evaluating abortion legislation.¹⁰⁴ The *Carhart* majority barely mentioned the interests that led Nebraska to enact this statute. Thus, the *Carhart* decision did little to clarify the murky and malleable undue burden standard set forth in *Casey*. States are left with little guidance in drafting abortion legislation.

Nonetheless, *Carhart* does seem to stand for the proposition that an outright prohibition on certain methods of abortion is unconstitutional if those methods are the only ones available to a woman at a certain time in her pregnancy.¹⁰⁵ However, such a rule seems obvious and offers little help to states drafting legislation that falls somewhere short of expressing an outright ban on an abortion procedure. Alternatively, the *Carhart* decision may be read to

99. Mark H. Woltz, *A Bold Reaffirmation? Planned Parenthood v. Casey Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787, 1806 (1993).

100. Annette E. Clark, *Abortion and the Pied Piper of Compromise*, 68 N.Y.U. L. REV. 265, 321 (1993) (footnote omitted).

101. See *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

102. See *id.* at 946 (Stevens, J., concurring).

103. See *id.* at 950-51 (O'Connor, J., concurring).

104. See *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992).

105. See *Carhart*, 530 U.S. at 945-46.

invalidate any state ban on a particular previability abortion procedure.¹⁰⁶

From the holdings of *Casey* and its pre-*Carhart* progeny, it appears that regulations designed to aid women in the informed consent process, regulations dealing with parental consent and notice, and regulations dealing with record-keeping requirements are constitutional.¹⁰⁷ On the other hand, under *Casey* and *Carhart*, statutes dealing with spousal notification and statutes prohibiting particular types of second-trimester abortion procedures fail to pass the undue burden test.¹⁰⁸

IV. CARHART AND THE RU-486 DEBATE

It is difficult to predict what types of regulations in the future will represent a state's valid furtherance of a compelling interest and what types of regulations will present undue burdens. *Carhart* left a number of questions unanswered. Does the banning of a particular previability method of abortion always place an undue burden in the path of a woman seeking an abortion, as Justice Stevens suggests?¹⁰⁹ Or is an undue burden presented only where the method in question is the only safe method available, as Justice O'Connor suggests?¹¹⁰ It is unclear which path the Court will adopt. The next section will focus on proposed RU-486 legislation and will assess the constitutionality of these bills using the undue burden framework presented in *Casey* and *Carhart*. Additionally, this section will show how important the resolution of this dilemma created by *Carhart* is to the unique issues presented by RU-486.

A. How RU-486 Works

On September 28, 2000, the United States Food and Drug Administration approved the drug mifepristone,¹¹¹ commonly known as RU-486, for use as an abortifacient.¹¹² The drug was approved for use in France in 1988, but it has met with considerable opposition in the United States.¹¹³ The FDA's approval of RU-

106. See *id.* at 940-41.

107. See *id.*; see also *Casey*, 505 U.S. 833 (1992); *Majurek v. Armstrong*, 520 U.S. 968 (1997).

108. See *Carhart*, 530 U.S. at 922; *Casey*, 505 U.S. at 877.

109. See *Carhart*, 530 U.S. at 946 (Stevens, J., concurring).

110. See *id.* at 951 (O'Connor, J., concurring).

111. "In the United States, the brand name for mifepristone is Mifeprex™, which is manufactured by Danco Laboratories, LLC . . ." MIFEPRISTONE: EXPANDING WOMEN'S OPTIONS FOR EARLY ABORTIONS, Mifepristone Fact Sheet, at http://www.plannedparenthood.org/library/ABORTION/Mif_fact.html (last visited Nov. 11, 2001) [hereinafter EXPANDING WOMEN'S OPTIONS].

112. *Id.*

113. See Daniel S. Levy, *A Long Journey*, TIME, Oct. 9, 2000, at 42. In June 1989, President Bush issued a ban on the import of the drug, which was lifted in 1993 when President Clinton came into office. In 1996, the Population Council filed a new-drug application with the FDA, and the drug was approved in 2000. *Id.*

486 contains relatively few restrictions on its distribution.¹¹⁴ The drug's label states that

[t]reatment with Mifeprex and misoprostol for the termination of pregnancy requires three office visits by the patient. Mifeprex should be prescribed only by physicians who have read and understood the prescribing information. Mifeprex may be administered only in a clinic, medical office, or hospital, by or under the supervision of a physician, able to assess the gestational age of an embryo and to diagnose ectopic pregnancies. Physicians must be able to provide surgical intervention in cases of incomplete abortion or severe bleeding, or have made plans to provide such care through others, and be able to assure patient access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary.¹¹⁵

Additionally, the drug has been approved for use only through the first forty-nine days of pregnancy; thereafter, a woman seeking to terminate her pregnancy must opt for a surgical abortion.¹¹⁶

B. The Significance of RU-486 as New Technology

To fully understand the dimension RU-486 adds to the abortion debate, it is necessary to set forth the characteristics that make it fundamentally different from surgical abortion. There is a compelling argument that new regulations will place an undue burden on a woman's right to choose to terminate her pregnancy, due in large part to the unique nature of this particular method of abortion. Although medical abortion requires three visits to the doctor's office, as opposed to the one visit necessary for surgical abortions, medical abortion is a non-invasive means of pregnancy termination requiring significantly less expertise than that required of surgical abortions.¹¹⁷ The difference is between taking a pill

114. Mifeprex Tablets Label at <http://www.fda.gov/cder/foi/label/2000/206871b1.htm> (last visited Nov. 11, 2001).

115. *Id.* The "medical abortion" (rather than "surgical abortion") occurs after the administration of two different drugs. At the healthcare provider's office, the patient is given 600mg of mifepristone in a single oral dose. Two days later, the patient returns to the health care provider and is evaluated to determine whether the embryo has been expelled. If not, then 400mcg of misoprostol are administered orally. This dosage is necessary for most patients. Soon after the administration of the misoprostol, the embryo is expelled in what amounts to a "heavy period." About fourteen days after mifepristone is administered, the patient is required to return to her health care provider for a check-up to determine whether a complete termination of the pregnancy has occurred. Thus, according to the FDA, a total of three office visits are required for a complete medical abortion. *Id.*

116. *See id.*

117. EXPANDING WOMEN'S OPTIONS, *supra* note 111. *See also* Elizabeth A. Silverberg, Note, *Looking Beyond Judicial Deference to Agency Discretion: A Fundamental Right of Access to RU-486?*, 59 BROOK. L. REV. 1551, 1559 (1994).

and undergoing surgery. That fundamental difference is the attraction and the advantage of RU-486.¹¹⁸ It allows women to terminate their pregnancies discreetly, with the actual expulsion of the embryo occurring in the privacy of their own homes.¹¹⁹ Another major attraction is RU-486's availability through virtually any gynecologist or family practitioner.¹²⁰ These means are far more available than surgical abortions.¹²¹

According to women who participated in the clinical trials for RU-486 prior to the drug's approval, the major lure of the drug was privacy and control.¹²² One woman, who had undergone a surgical abortion several years prior to her experience with RU-486 stated, "The whole experience was much less traumatic than my surgical abortion. . . . I felt much more in control and calmer being at home It made all the difference."¹²³ Another woman found her experience with the RU-486 clinical trials to be more positive than surgical abortion: "I didn't want to just lie back on a table and have something done to me. . . . When you have an unplanned pregnancy, control is really important. I wanted to be involved."¹²⁴

Thus, although the complete "medical abortion" requires three trips to the doctor's office, women involved in the clinical trials found that the extra trips far outweighed the "baggage" associated with obtaining a surgical abortion.¹²⁵ Because the drug can be prescribed and administered in the doctor's office of any physician meeting the FDA requirements—most general practitioners and gynecologists are qualified¹²⁶—the pills can be obtained discreetly, conveniently, and without the necessity of crossing the picket lines surrounding most abortion clinics.¹²⁷ In effect, the drug could bring about what some commentators term "anonymous abortions."¹²⁸ Women with access to the drug may not be faced with the potential public condemnation associated with surgical abortions.¹²⁹

118. See Silverberg, *supra* note 117, at 1559.
119. *Id.*
120. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.
121. *Id.*
122. *Id.* See also Dana Hudepohl, *RU-486: Not Just an Abortion Drug. Could It Save Your Life?* GLAMOUR, Jan. 2001, at 126.
123. *Id.* at 194.
124. Noelle Howey, *What You Can Learn from My RU-486 Abortion*, SELF, Apr. 2000, at 97.
125. Hudepohl, *supra* note 122, at 127.
126. See Nancy Gibbs, *The Abortion Pill*, TIME, Oct. 9, 2000, at 40.
127. Hudepohl, *supra* note 122, at 127.
128. David Whitman & Stacey Schultz, *A Little Pill but a Big Dispute*, U.S. NEWS & WORLD REPORT, Oct. 9, 2000, at 18, available at LexisNexis, U.S. News & World Report File.
129. *Id.* One commentator stated that
[t]he abortion pill may also lessen the stigma of abortion and public qualms about the procedure. In many cases, drug-induced abortions will take place in patients' homes after they take RU-486 and misoprostol, and they will generally occur earlier in the pregnancy than surgical abortions. Opinion polls consistently show that Americans find abortions in the first few weeks of pregnancy less troubling than those performed in the

The convenience of RU-486 attracts other women, especially those in rural areas.¹³⁰ Due to pro-life protests, the number of abortion clinics has decreased, making it difficult for many women to obtain surgical abortion. "Protesters can now easily identify abortion providers, and the picketing, harassment, and incidents of violence—including the murders of three doctors—have thinned the ranks of clinics, hospitals, and physicians offering abortions in recent years."¹³¹ Furthermore, women in rural areas typically have to drive long distances to obtain surgical abortions.¹³² RU-486, on the other hand, may be obtained through a local family practitioner or gynecologist.

An additional difference between surgical abortions and RU-486 is that medical abortions can be performed earlier in pregnancy than surgical abortions.¹³³ Thus, a woman with access to RU-486 need not delay her decision until surgery can be performed.¹³⁴

C. Proposed Regulatory Statutes and Undue Burden Analysis

The approval of RU-486 places the abortion debate on an entirely different plane than it was at the time *Casey* and *Carhart* were decided. The undue burden analysis was developed with only surgical abortions in mind. The privacy and control associated with the drug and its potential widespread availability make RU-486 an attractive option for women seeking to terminate an early pregnancy. With access to this new technology as open as many anticipate it will be,¹³⁵ will any regulation place an undue burden on a woman's right to choose? The answer depends in large part upon how one reads the *Carhart* opinion. If one adopts the O'Connor view,¹³⁶ then a ban on RU-486 would not place an undue burden on a woman's right to choose. However, if the *Carhart* opinion is interpreted to mean that a ban on any form of previability abortion places an undue burden on a woman's right to choose, then proposed RU-486 legislation will not survive.

The Supreme Court had an opportunity to determine whether denial of access to RU-486 placed an undue burden on a woman's right to choose to terminate her pregnancy in *Benten v. Kessler*.¹³⁷ This case came before the Court in 1992, before the FDA approved RU-486.¹³⁸ In *Benten*, a woman tried to import the

second or third trimesters.

Id.

130. *See id.*

131. *Id.* "Nationwide, the number of abortion facilities fell from 2380 in 1992 to 2042 in 1996" *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. A survey conducted found that "44 percent of gynecologists and 31 percent of family practitioners would be at least 'somewhat likely' to prescribe RU-486." *Id.*

136. *See Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (O'Connor, J., concurring).

137. 505 U.S. 1084 (1992) (application to vacate stay denied).

138. *Id.*

drug from Europe in order to terminate her pregnancy.¹³⁹ Federal officials confiscated the supply of the drug, and the Supreme Court upheld the confiscation.¹⁴⁰ However, Justice Stevens argued that the government's confiscation of the drug placed an undue burden on the woman's constitutionally protected right to abort her pregnancy.¹⁴¹ In response, the majority stated that it expressed "no view on the merits of this assertion."¹⁴² Thus, the question of whether regulating a woman's access to the drug places an undue burden on her right to choose is still open.

On October 4, 2000—mere days after the drug's FDA approval—politicians introduced a bill in both houses of Congress designed to "require the Food and Drug Administration to establish restrictions regarding the qualifications of physicians to prescribe the abortion drug commonly known as RU-486."¹⁴³ The proposed statute, known as the "RU-486 Patient Health and Safety Protection Act," reads in pertinent part:

With respect to the application that was submitted under section 505(b) of the Federal Food, Drug, and Cosmetic Act for the drug mifepristone (commonly referred to as RU-486, to be marketed as MIFEPREX), and that was approved on September 28, 2000, the Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs, shall promptly modify the conditions of the approval of such drug to establish the additional restriction that the drug may not be prescribed by any person other than a licensed physician who meets the following requirements:

(1) The physician is qualified to handle complications resulting from an incomplete abortion or ectopic pregnancy.

(2) The physician has been trained to perform surgical abortions and has met all applicable legal requirements to perform such abortions.

(3) The physician is certified for ultrasound dating of pregnancy and detecting ectopic pregnancy.

(4) The physician has completed a program regarding the prescribing of such drug that uses a curriculum approved by the Secretary.

(5) The physician has admitting privileges at a hospital to which the physician can travel in one hour or less, determined on the basis of starting at the principal medical office of the physician and traveling to the hospital, using the transportation means normally used by the physician to travel to the hospital, and under the average conditions of

139. *Id.* at 1084.

140. *Id.* at 1084-85.

141. *Id.* at 1085-86 (Stevens, J., dissenting).

142. *Id.* at 1085.

143. RU-486 Patient Health and Safety Protection Act, H.R. 482, 107th Cong. (2001); S.R. 251, 107th Cong. (2001). This bill was referred to the House Committee on Energy and Commerce on February 7, 2001.

travel for the physician.¹⁴⁴

Under the undue burden standard presented in *Casey* and applied in *Carhart*, it is likely that such a bill would survive a constitutional challenge, given its emphasis on procedural safety. This statute sets forth what appear to be reasonable guidelines aimed at protecting women's safety.

Under Justice O'Connor's view in *Carhart*, the bill will not place an undue burden on a woman's right to choose.¹⁴⁵ An argument could be made that these regulations fall into the same category as those rules upheld in *Casey*: regulations aimed at informed consent, parental notification, and waiting periods.¹⁴⁶ Those regulations upheld in *Casey* were designed to ensure that women received adequate information about their choice; additionally, none of the restrictions had the effect of placing the woman's health in jeopardy.¹⁴⁷ Similarly, the guidelines set forth in the proposed congressional bill are aimed at protecting a woman's health by placing additional requirements on the treating physician, not by placing additional burdens on a woman seeking an abortion.¹⁴⁸ Additionally, these requirements merely duplicate many of the requirements already in place upon physicians who perform surgical abortions.¹⁴⁹ Thus, at the very least, it would be no more difficult for a woman to obtain an abortion under this bill than it ever has been, indicating that the proposed regulations do not place an undue burden on a woman's right to choose to terminate her pregnancy.

However, if Justice Stevens' position in *Carhart*¹⁵⁰ is followed, then these regulations could be seen as an undue burden on a woman's right to choose. The advantages of RU-486—control, privacy, and availability in rural areas¹⁵¹—may be negated by a bill of this sort. The drug is currently available through general practitioners, many of whom may not meet the requirements of the bill. If the bill passes, then it could strike a major blow to the availability of the drug and place an undue burden on a woman's ability choose terminate her pregnancy, especially in rural areas. A woman who would have had access to the drug through her family doctor would then have to travel to an abortion clinic where her privacy and control will be compromised. For many rural women, the

144. *Id.*

145. Under *Casey* and *Carhart*, this proposed bill would place an undue burden on a woman's right to choose to terminate her pregnancy only if the restrictions have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. See *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992); *Carhart*, 530 U.S. at 947-52.

146. See *Casey*, 505 U.S. at 879.

147. See *id.*

148. See RU-486 Patient Health and Safety Protection Act, H.R. 482, 107th Cong. (2001).

149. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.

150. See *Carhart*, 530 U.S. at 946 (Stevens, J., concurring). Justice Stevens suggested that there was no room for states' interests in regulating previability abortions, even though the undue burden standard provides for courts to take those interests into account. *Id.* (Stevens, J., concurring).

151. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.

prospect of traveling to an abortion clinic may place a substantial obstacle in their paths to terminate their pregnancies.

Furthermore, RU-486 can be used earlier than most surgical abortions can be performed.¹⁵² This bill could limit prescription privileges of the drug to essentially the same individuals who are licensed to perform surgical abortions. Women who wish to terminate their pregnancies early but cannot obtain access to the drug will be forced to wait until the pregnancy has proceeded to the point where only a surgical abortion may be performed.¹⁵³ Therefore, a bill limiting the drug's availability may place an undue burden on a woman's ability to choose *when* to terminate her pregnancy. However, even if a court accepts that the regulations may make it more difficult for women to get RU-486, the compelling state interest of protecting the health of the mother will probably be cited as a reason for justifying the regulations imposed by Congress.

Another type of proposed regulation offered from states appears in the form of an outright ban of the drug. On January 4, 2001, a bill banning the distribution of RU-486 in the state of Oklahoma was presented before the Oklahoma legislature:

A. It shall be unlawful for any person to prescribe, dispense, distribute, or otherwise make available mifepristone (RU-486) in this state.

B. Any person violating the provisions of this section, upon conviction thereof, shall be guilty of a felony.

C. Any person, authorized by the laws of this state to prescribe, dispense, or distribute medicine in this state, prescribing, dispensing, distributing, or otherwise making available mifepristone (RU-486) in this state, in violation of the provisions of this section, shall be subject to license suspension, revocation, or other administrative penalties by the state administrative licensing entity.¹⁵⁴

When faced with a ban on a particular abortion procedure, it becomes evident through *Carhart* that the undue burden standard is not the best vehicle for analyzing the constitutionality of this proposal. Under the trimester framework of *Roe*, such an outright ban clearly would have been unconstitutional. Because the drug has been approved only for use during the first forty-nine days of pregnancy—well within the first trimester—*Roe* would have unconditionally protected a woman's right to terminate her pregnancy using RU-486.

Under *Casey* and *Carhart* however, the constitutionality of Oklahoma's proposed statute is less clear.¹⁵⁵ The *Casey* Court abandoned the trimester system

152. Howey, *supra* note 124, at 97-98.

153. *See id.*

154. H.B. 1038, 48th Leg., 1st Sess. § 1 (Okla. 2001). This bill was referred to the Oklahoma House Committee on Public Health on February 6, 2001.

155. Although this discussion is limited to the statute's constitutionality according to *Casey*'s and *Carhart*'s undue burden standards, the state's outright ban may have other constitutional problems in terms of effectively "overruling" the FDA where it appears that the FDA has preempted

and held that states may regulate previability abortions to achieve a compelling state interest provided that the regulation does not present an undue burden on a woman's right to choose.¹⁵⁶ The *Carhart* majority opinion, which also considered an outright ban on a particular abortion procedure, provided little guidance in setting forth standards for states wishing to establish abortion regulations. At the very least, the Court appears to have held unconstitutional any outright ban on partial birth abortion procedures in the absence of other available means of pregnancy termination.¹⁵⁷ This statement reflects Justice O'Connor's concurrence. Thus, a logical corollary to this rule might be as follows: Where other means of pregnancy termination are available to a woman seeking a particular abortion procedure, the state may prohibit that procedure if it has a compelling state interest. Because RU-486 is merely one type of abortion method, banning RU-486 would be constitutional if the state had a compelling interest.

Under Justice O'Connor's view, it would be permissible for a state to ban the use of RU-486 if it could show a compelling state interest for doing so.¹⁵⁸ Such an action would not unduly burden a woman's right to choose to terminate her pregnancy because surgical abortions would still be available to her. The two primary interests states use to justify abortion regulations are protecting the health of the mother and protecting fetal life.¹⁵⁹ Oklahoma could argue that the ban on RU-486 furthers the state interest of protecting the health of the mother, an interest that the Supreme Court has recognized as compelling.¹⁶⁰ Because the actual expulsion of the embryo occurs without medical supervision,¹⁶¹ the state could argue that an abortion induced by RU-486 places the mother's safety at risk. Additionally, because most general practitioners can prescribe the drug under the FDA guidelines, the state could argue that the woman risks obtaining the drug from a physician not qualified to handle the complications that could arise from the induced miscarriage. Although the Court would probably recognize these interests, it is important to note that they may be achieved in a less restrictive way through a regulatory statute such as the RU-486 Patient Health and Safety Protection Act.¹⁶²

The state also may argue that the interest of protecting fetal life would validate the ban on RU-486. However, such an argument was not accepted in *Carhart*, where the interest in fetal life was arguably more compelling because the abortion procedure in question affected more fully developed fetuses.¹⁶³ Studies have shown that individuals find early abortions more "acceptable" than

state action. Silverberg, *supra* note 117, at 1600.

156. *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992).

157. *See Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (O'Connor, J., concurring).

158. *Id.* at 947-52 (O'Connor, J., concurring).

159. *See id.* (O'Connor, J., concurring).

160. *See id.* (O'Connor, J., concurring).

161. *See EXPANDING WOMEN'S OPTIONS*, *supra* note 111.

162. H.R. 482, 107th (2001).

163. *See Carhart*, 530 U.S. at 922.

late term abortions, reflecting the societal view that the interest in fetal life becomes more compelling as the pregnancy progresses.¹⁶⁴ Thus, it is unlikely given the Court's decision in *Carhart* not to uphold Nebraska's partial birth abortion statute that it would uphold Oklahoma's statute. Nonetheless, under Justice O'Connor's view, this statute would probably be constitutional because other means of first trimester abortions would still be available to women seeking to terminate a pregnancy.

However, the *Carhart* majority opinion might be interpreted to mean that *any* outright ban on a particular method of previability abortion is unconstitutional as placing an undue burden on a woman's right to choose, consistent with Justice Stevens' position.¹⁶⁵ If this interpretation is adopted, then Oklahoma's ban on RU-486 would be unconstitutional regardless of the proposed compelling state interest. Even though surgical abortions are available to women, a ban on RU-486 would unduly burden a woman's right to choose because RU-486 operates *before* most surgical abortions can be performed.¹⁶⁶ Therefore, a ban on RU-486 would unduly burden a woman's right to choose *when* to have her abortion. Such a ban would have the purpose and effect of placing a substantial obstacle in the path of a woman seeking an early pregnancy abortion. For women in many rural parts of the country, surgical abortions are difficult to obtain.¹⁶⁷ In contrast, RU-486 will allow virtually every American woman easy access to early pregnancy abortions.¹⁶⁸ Placing a ban or heavily regulating the availability of the drug would place a substantial obstacle in the path of a woman in rural America seeking an abortion. Additionally, RU-486 allows women a large degree of privacy; they can obtain the drug from their family practitioner and undergo much of the "procedure" in the privacy of their own homes.¹⁶⁹ Thus, these women can avoid the stigma and trauma that accompanies obtaining a surgical abortion at an abortion clinic.¹⁷⁰ Denying women access to such a private means of pregnancy termination unduly burdens their ability to choose abortion.¹⁷¹ Thus, although the state may convey a compelling state interest in regulating the availability of the drug, a court adopting Justice Stevens' view may find one of the above arguments viable and hold that the regulation of the drug places an undue burden on a woman's right to choose the manner to terminate her pregnancy. Consequently, the regulation would be found unconstitutional if Justice Stevens' view were adopted.

164. See Whitman & Schultz, *supra* note 128.

165. *Carhart*, 530 U.S. at 946 (Stevens, J., concurring).

166. Howey, *supra* note 124.

167. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.

168. See *id.*

169. See *id.*

170. See *id.*

171. See *id.*

CONCLUSION

The primary criticism of *Casey*, used by both sides of the abortion debate, is that the undue burden standard is vague, mushy, malleable, and too easily manipulated. It provides an unworkable framework for evaluating abortion issues. *Carhart* did little to clarify the murkiness surrounding the undue burden standard and left open the question of whether a ban on a particular previability abortion procedure was an undue burden per se, or whether a particular method could be banned provided that other methods of abortion remained available. After *Carhart*, the boundaries of the undue burden standard are unclear. The emerging debate over RU-486 provides another venue for testing the undue burden standard, and the question presented in *Carhart* must be answered in order to properly assess this new proposed legislation.

RESTORING CIVILITY—THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000: BABY STEPS TOWARDS A MORE CIVILIZED CIVIL FORFEITURE SYSTEM

BARCLAY THOMAS JOHNSON*

INTRODUCTION

Starting in 1970, the United States employed civil forfeiture, a civil *in rem* proceeding, to combat the nation's drug problems by striking at the proceeds or instrumentalities of narcotics crimes. However, the government's ability, via the civil forfeiture statutes, to seize property on mere probable cause and, for two decades, without notice, provoked many concerns.¹ Charlotte Juide described her experience with the United States' civil forfeiture laws as:

On Friday morning, April 27, 1990 . . . I was woken up by men shouting inside my apartment. I did not give anyone permission to enter my apartment before these people came in.

At least one man came into my room while I was in bed. He had a gun drawn which he pointed directly at my head. He demanded that I get out of bed and pack up some things and get out of the apartment immediately. I was afraid. I had to go to the bathroom and when I asked the man if I could go to the bathroom, he first went into my bathroom and looked around. He said he was looking for weapons. He came out and said I could use the bathroom now, but he would not let me shut the door. He stayed just outside the bathroom door while I used the toilet. I think he was watching me the whole time I was on the toilet.²

Ms. Juide, a public housing tenant, further noted:

Before my apartment was entered by force on the morning of April 27, 1990, I was not notified that the government was planning to seize my apartment. I was not told that any complaint for forfeiture had been filed against my apartment or that I could demand a hearing before the U.S. Marshalls and [that] local police could forcibly come into my apartment

* J.D. Candidate, 2002, Indiana University School of Law—Indianapolis; M.A., 1997, University of Massachusetts—Amherst; B.A., 1994, Earlham College, Richmond, Indiana. I benefited from the thoughts and comments of Professor Florence Wagman Roisman. Any errors and omissions in the final product remain my own.

1. Another problem, not explicitly considered here, is the right to counsel. Although the court in *United States v. Sardone*, 94 F.3d 1233 (9th Cir. 1996), held that there was no right to effective assistance of counsel in civil forfeiture proceedings, the Civil Asset Forfeiture Reform Act properly recognizes that significant property interests are involved in forfeiture proceedings against an individual's primary residence and provides for the appointment of counsel from the Legal Services Corporation. Civil Asset Forfeiture Reform Act of 2000, Pub L. No. 106-185, § (b), 114 Stat. 202, 205 (2000) (codified at 18 U.S.C. § 983(b)).

2. Affidavit of Charlotte Juide, May 11, 1990, ¶¶ 6, 7.

and throw me out on the street.³

Ms. Juide's experience with our nation's civil laws process was, unfortunately, not unique and therefore helps to illustrate that these laws were ripe for reform. This Note examines several of the serious problems that have persisted for years, and in some cases, decades in the United States' civil forfeiture laws. This Note considers the federal, drug-related civil forfeiture laws under which the majority of drug-related civil forfeitures occur. These forfeitures typically occur under 21 U.S.C. § 881(a) and usually involve conveyances (cars, trucks, and things that go),⁴ money and negotiable securities,⁵ and real property.⁶ This Note then examines the Civil Asset Forfeiture Reform Act of 2000 (Reform Act), which has made some significant progress towards making these laws more equitable. The Note does not deal with civil forfeiture or criminal forfeiture under state law or under federal statutes other than 21 § U.S.C. 881(a).

Toward this end, Part I of this Note first examines the history of forfeiture laws in general, and United States' civil forfeiture laws in particular. In Part II, this Note identifies several of the major, systemic problems that existed prior to the reform of the civil forfeiture laws. Specifically, this Note singles out (a) lack of notice, (b) the elements of an "innocent owner" defense, (c) improper burdens of proof, (d) a split in the federal circuit courts regarding the proper test for violations of the Eighth Amendment's Excessive Fines Clause, and (e) the government's problematic motivation in conducting civil forfeiture proceedings. In Part III, this Note provides a general overview of the Civil Asset Forfeiture Reform Act of 2000 and, in Part IV, examines the ways in which the Reform Act does and does not remedy the problems discussed in Part II. Finally, drawing on Part IV, Part V of this Note concludes by reviewing the problems yet to be fully addressed in the civil forfeiture laws, and reviews the suggestions made in Part IV.

This Note ultimately argues that the Reform Act fails to fully solve three problems in the civil forfeiture laws. First, the Act fails to completely equalize the burdens of proof required of the government and innocent owners. Next, the Reform Act fails to adopt the proper inquiry under the Excessive Fines Clause. Rather, the Reform Act adopts only a proportionality inquiry as opposed to a multi-factored approach that considers both proportionality and instrumentality. Finally, in an effort to solve the post-illegal act transferee problem, the act makes it impossible for heirs, spouses, and minor children to protect their property.

3. *Id.* at ¶ 10.

4. 21 U.S.C. § 881(a)(4) (2000).

5. *Id.* at § 881(a)(6).

6. *Id.* at § 881(a)(7). See also Jimmy Gurule, *Introduction: The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 157-58 (1995).

I. OVERVIEW OF CIVIL FORFEITURE LAWS PRIOR TO THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000: GENERAL BACKGROUND INFORMATION

A. *Forfeiture of Property Involved in Crimes Has a Long History*

The history of civil forfeiture law is not merely an esoteric exercise. The U.S. Supreme Court's major decisions on civil forfeiture each contain significant investigations into the history of this legal procedure.⁷ Forfeiture of property involved in wrongful acts has a long and, many would say, ancient history. In the common law era, the basis for forfeiture was thought to rest in the Bible. Thus, *Exodus* 21:28 provides: "If an ox gores a man or woman to death, the ox will be stoned and its meat will not be eaten, but the owner of the ox will not be liable."⁸ This passage was cited by Coke in his treatment of the deodand⁹ (a mistranslation of *deo dandum*, "a thing that must be offered to God"¹⁰) and subsequently noted

7. See, e.g., *Austin v. United States*, 509 U.S. 602 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. 427 & 429 Hall Street*, 74 F.3d 1165 (11th Cir. 1996) (reaching as far back as the Magna Carta to find that a proportionality prong was necessarily a part of any claim under the Eighth Amendment). But see *Austin v. United States*, 509 U.S. 602, 628-29 (1993) (Kennedy, J., concurring.) Justice Kennedy observed that

we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved. I see something of that in the Court's opinion here, for in its eagerness to discover a unified theory of forfeitures, it recites a consistent rationale of personal punishment that neither the cases nor other narratives of the common law suggest.

Id. See also Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897). In this speech Holmes famously observed that

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id. at 469.

8. *Exodus* 21:28 (New Jerusalem Bible).

9. It is a matter of no small moment that, later, Blackstone discusses the deodand, and this form of forfeiture, in a section on the king's revenue. Thus he says, "[t]he next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offences." 1 WILLIAM BLACKSTONE, COMMENTARIES 289. The United States government and the several states have been accused of using civil forfeiture not merely as a restitutive mechanism but also to punish and to raise revenue. See, e.g., HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 38-40, 53 (1995). Indeed, the link between civil forfeiture and government revenue has always been a cozy one. During the Nineteenth Century, before the days of federal income tax, custom duties accounted for more than eighty percent of the federal government's revenue. In those days, civil forfeiture was the primary method of enforcing these custom duties and thus served as an important protector of government revenue. See Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911, 940 n.137 (1991).

10. 1 BOUVIER'S LAW DICTIONARY 844 (8th ed. 1914).

by Blackstone.¹¹ In fact, modern civil forfeiture is typically traced back to the deodand,¹² which was "[a]ny personal chattel whatever, animate or inanimate, which is the immediate cause of the death of a human creature. It was forfeited to the king to be distributed in alms by his high almoner 'for the appeasing,' says Coke, 'of God's wrath.'"¹³ The deodand is itself a fairly ancient concept and its use in the common law system dates to at least 1292.¹⁴ It was finally abolished in 1846. According to Blackstone, at common law there were eight ways that real property could be forfeited.¹⁵ Only one of these ways, the first of Blackstone's eight categories, statutory forfeiture, made its way into American law and, in 1970, it took the form of 21 U.S.C. § 881(a).¹⁶ Thus, in *United States v. Bajakajian*, the Court observed "that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking."¹⁷ The Court noted that the Senate Judiciary Committee admitted that the revival of these common law proceedings "represents an innovative attempt to call on our common law heritage to meet an essentially modern problem."¹⁸

B. U.S. Forfeiture Law—Prior to Reform

The statutory basis for the federal, drug-related civil forfeitures discussed in this Note is 21 U.S.C. § 881(a). It is under this section that the majority of drug-related civil forfeitures occur; the properties most often seized are conveyances, money and negotiable securities, and real property.¹⁹ Section 881(a) was first

11. See 1 BLACKSTONE, *supra* note 9, at 291; 3 COKE INSTITUTES 57-58; see also Oliver Wendell Holmes, Jr., *The Common Law*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 127 (Sheldon M. Movick, ed., Univ. of Chicago Press 1995).

12. See, e.g., *Calero-Toledo*, 416 U.S. at 681; Gurule, *supra* note 6, at 156.

13. 1 BOUVIER'S LAW DICTIONARY, *supra* note 10, at 844.

14. 4 OXFORD ENGLISH DICTIONARY 467-68 (2d ed. 1989).

15. The eight ways, which often dealt with religion, according to Blackstone, were crimes and misdemeanors (the deodand and other specific crimes such as treason and praemunire (*praemunire facis*—maintaining papal sovereignty in England and thus denying the supremacy of the sovereign over the Church of England)), 4 BLACKSTONE, *supra* note 9, ch. 8; 3 BOUVIER'S LAW DICTIONARY, *supra* note 10, at 2651, alienation of land contrary to prescribed laws of the land (this method was often used to combat the church's attempt to accumulate land and power), "non-presentation to a benefice, when forfeiture is denominated a lapse" (that is, if the owner does not confer the benefice on a minister, his right to the property lapses), simony (the sale or purchase of ecclesiastical preferments, benefits, or emoluments), non-performance of conditions, waste of a property such that it damages the interests of those holding the remainder or reversion interests, breach of copyhold customs (that is, breach of those duties the copyholder owed the lord), and bankruptcy. 2 BLACKSTONE, *supra* note 9, at 267-86.

16. Pub. L. No. 91-513, § 511, 84 Stat. 1276 (1970).

17. 524 U.S. 321, 332 n.7 (1998).

18. S. Rep. No. 91-617, at 79 (1969), quoted in *Bajakajian*, 524 U.S. at 332 n.7.

19. See Gurule, *supra* note 6, at 157-58.

enacted in 1970 as part of the Comprehensive Drug Control Act of 1970.²⁰ It provided:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.²¹

As first enacted, § 881(a) was a fairly modest law and provided for the forfeiture of conveyances only; it did not permit the forfeiture of money, negotiable securities, or real property. Over the years, § 881 was amended several times in important ways that made it a significantly more powerful law-enforcement tool.²² The 1978 amendment²³ added paragraph six, which allows “[a]ll moneys,

20. Pub. L. No. 91-513, § 511, 84 Stat. 1276 (1970).

21. *Id.* (codified at 21 U.S.C. § 881(a) (1970)).

22. The statutory scheme has been amended a number of times in minor ways as well: Pub. L. No. 96-132, § 14, 93 Stat. 1048 (1979) (this amendment made minor changes to the statute’s language); Pub. L. No. 99-570, 100 Stat. 3207 (1986) (same); Pub. L. No. 99-646, 100 Stat. 3618 (1986) (same); Pub. L. No. 101-189, 103 Stat. 1569 (1989) (same); Pub. L. No. 101-647, 104 Stat. 4855 (1990) (added subsections ten (drug paraphernalia) and eleven (firearms) to § 881(a)); Pub. L. No. 102-239, 105 Stat. 1912 (1991) (made minor changes); Pub. L. No. 103-447, 108 Stat. 4693

negotiable instruments, securities, or other things of value furnished . . . in exchange for a controlled substance” to be forfeited. Section 881 was amended in 1984²⁴ to add paragraph (a)(7), which allowed for the forfeiture of real property. Another important change made by the 1984 amendment was to provide that the proceeds of civil forfeiture be deposited into special forfeiture funds at the Department of Justice and the Department of Treasury. Previously funds were deposited into the U.S. Treasury’s general fund.²⁵ Section 881 was amended again in 1988 as part of the Anti-Drug Abuse Act of 1988.²⁶ This change permitted forfeitures of leasehold interests and added subparagraph (a)(4)(C), another innocent owner defense. In April 2000, the Civil Asset Forfeiture Reform Act of 2000²⁷ substantially rewrote the federal civil forfeiture laws. This amendment is one of the primary subjects of this Note and is considered in Part III. Finally, the U.S.A. Patriot Act of 2001²⁸ exempted certain anti-terrorism laws from the civil forfeiture procedures,²⁹ but provides that owners of property “that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists³⁰ may make use of the new civil forfeiture laws and other laws, including the Administrative Procedure Act to claim property.³¹

In its final form prior to the Reform Act, § 881(a) provided that the following types of property were subject to forfeiture (paragraphs 4, 6, and 7 are most pertinent):

- (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
 - (1) All controlled substances which have been manufactured, distributed,

(1994) (same); Pub. L. No. 104-237, 110 Stat. 3101 (1996) (same).

23. Pub. L. No. 95-633, § 301(a), 92 Stat. 3777 (1978).

24. Pub. L. No. 98-473, §§ 306, 309, 518, 98 Stat. 2050, 2051, 2075 (1984). An issue not expressly considered in this Note is the “relation-back doctrine,” which was added to the scheme in 1984 and provides that title vests in the United States on the commission of the illegal acts that subject the property to forfeiture.

25. The special forfeiture funds provide a unique mechanism whereby the proceeds of property seized by local police agencies are returned more or less directly to them. *See e.g.*, Brant C. Hadaway, Comment: *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81 (2000). Hadaway, and others, identify this mechanism as the root of many of the egregious civil forfeiture excesses.

26. Pub. L. No. 100-690, § 5105, 102 Stat. 4301 (1988).

27. Pub. L. No. 106-185, 114 Stat. 202 (2000).

28. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 316, 115 Stat. 309-10 (Oct. 26, 2001).

29. 18 U.S.C. § 983(i)(2)(D) (2002).

30. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 316(a), 115 Stat. 309-10 (Oct. 26, 2001); 18 U.S.C. § 983(a) (2002).

31. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 316(c)(1)(A)-(C), 115 Stat. 309-10 (Oct. 26, 2001).

dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this

paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.³²

The civil forfeiture laws have been subject to a wide variety of criticism and this Note examines (a) lack of notice, (b) the elements of an “innocent owner” defense, (c) improper burdens of proof, (d) a split in the federal circuit courts regarding the proper test for violations of the Eighth Amendment’s Excessive Fines Clause, and (e) the government’s problematic motivation in conducting civil forfeiture proceedings.

II. SPECIFIC CRITICISMS OF CIVIL FORFEITURE LAWS

A. Notice

The fact that property could be subject to forfeiture without notice was a serious problem and resulted in certain obvious injustices; hence, Charlotte Juide’s experience with armed men intruding into her bedroom. Prior to *United States v. James Daniel Good Real Property*,³³ the civil forfeiture laws required no notice for the forfeiture of any type of property. This situation arose from the U.S. Supreme Court’s holding in *Calero-Toledo* that the government could seize property without affording prior notice or hearing (at least in the case of chattels).³⁴ In *James Daniel Good Real Property*, the United States filed suit seeking to forfeit James Daniel Good’s house and the surrounding property he owned in August 1989.³⁵ This *in rem* suit was based on Good’s conviction for

32. 21 U.S.C. § 881(a) (2000).

33. 510 U.S. 43, 62 (1993) (“Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.”)

34. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80 (1974) (noting that conveyances were items likely to be removed from the grasp of law enforcement).

35. *James Daniel Good Real Property*, 510 U.S. at 46-47.

promoting a harmful drug in the second degree following a January 1985 search of his home. In an *ex parte* proceeding, the property was declared forfeit and then seized in late August 1989 (some four years later). Good contested the forfeiture, but the district court granted the government's motion for summary judgment. The court of appeals later affirmed the forfeiture, reversed on other grounds, and remanded the case for further proceedings. The U.S. Supreme Court finally struck down the forfeiture, holding that

the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.³⁶

Nonetheless, the Supreme Court's holding in *Good* does not necessarily apply to other forms of property that are easily moved or easily disposed.³⁷ This means that property is often still seized with no notice, which raises significant due process concerns. For instance, in *United States v. \$506,231 in U.S. Currency*,³⁸ the Seventh Circuit rebuked the government after the Chicago Police and the United States seized and attempted to declare forfeit "half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity."³⁹ The Seventh Circuit further admonished the government:

As has likely been obvious from the tone of this opinion, we believe the government's conduct in forfeiture cases leaves much to be desired. We are certainly not the first court to be "enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for the due process that is buried in those statutes."⁴⁰

The concerns about due process inherent in the lack of notice frequently afforded property owners presents a difficult issue. In part, the issue is tied to the low burden of proof required under the pre-Reform Act laws, which allowed property to be seized on mere probable cause. It seems likely the government's interest in securing possession of conveyances and other easily disposable items

36. *Id.* at 62.

37. In all fairness, it does seem difficult to reconcile desires for additional notice to the forfeiture of conveyances and other easily disposed of property.

38. 125 F.3d 442 (7th Cir. 1997).

39. *Id.* at 454; *accord* *United States v. Currency*, U.S. \$42,500.00, 283 F.3d 977, 981 (9th Cir. 2002) ("A large amount of money standing alone, however, is insufficient to establish probable cause.").

40. 125 F.3d at 442 (quoting *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992)).

means that these items will always be able to be seized without notice; it is simply too easy to drive, fly, or sail such items away. On the other hand, given the importance of property rights in America, the requirement that the government provide notice before the seizure of real property, absent exigent circumstances, is the right rule.

B. Innocent Owner Defense

One of the most troubling parts of civil forfeiture law has long been the worry that the property of innocent owners could be forfeited based on third-party conduct that the owner did not know of and/or could not reasonably foresee. Although at the common law there was usually no innocent owner provision, an innocent owner provision has been part of § 881(a) since it was enacted. Further, since the U.S. Supreme Court decided *Calero-Toledo* in 1974, it was widely assumed, based on language in that case, that such a provision was mandated by the Constitution. In *Calero-Toledo*, the Puerto Rican government initiated forfeiture proceedings against a \$19,800 rental yacht following the discovery of one marijuana cigarette that belonged to the individual renting the yacht. The Court upheld the forfeiture even though all parties conceded the owner "had no knowledge that its property was being used in connection with or in violation of (Puerto Rican Law)."⁴¹ However, the Court said it would be difficult to reject a constitutional claim where

an owner . . . proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.⁴²

Based on this pronouncement, most interested parties assumed an innocent owner defense was based on the Constitution; that is, until 1996, when the Supreme Court decided *Bennis v. Michigan*.⁴³

In *Bennis*, the Court upheld the forfeiture of a car owned by Bennis and her husband. The forfeiture was based on her husband's conviction for engaging in gross indecency with a prostitute. The Court held that Bennis was not entitled to an innocent owner defense even though she did not know her husband would use the vehicle to violate Michigan's laws and that the forfeiture did not violate Bennis' due process rights.⁴⁴ That decision, that an innocent owner defense is not constitutionally required, has generated a good deal of concern and comment.

For instance, Justice Thomas, in his concurring opinion, noted that "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is

41. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 (1974).

42. *Id.* at 689-90 (footnote omitted).

43. 516 U.S. 442 (1996).

44. *Id.* at 446-47.

unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”⁴⁵ In his dissent, Justice Stevens went further and echoed the concerns that absent a robust innocent owner defense, “[t]he logic of the Court’s analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts.”⁴⁶ The logic of Justice Stevens’ point and the paucity of the majority’s holding was not lost on the media. For example, the *Chicago Tribune* asked,

Can the government now seize a hotel or a football stadium merely because the owners failed to prevent illegal acts that they didn’t condone and knew nothing about? Can it confiscate your house because, while you were out for the evening, your teenager was caught smoking dope on the patio? It’s hard to see why not.⁴⁷

It thus appears that, despite the Supreme Court’s admonition that “[i]n our jurisprudence guilt is personal,”⁴⁸ an innocent owner is not constitutionally entitled to an innocent owner defense. That an innocent owner should be constitutionally entitled to such a defense because “[f]undamental fairness prohibits the punishment of innocent people”⁴⁹ is a matter beyond the scope of this Note.⁵⁰ However, at least one court⁵¹ has distinguished *Bennis*, noting the car was an instrumentality of the crime and its value was essentially de minimis (it was very old). It is thus far from a settled matter that there is not a constitutionally mandated innocent owner defense.

Prior to the Reform Act, the federal innocent owner defense was a matter of some confusion primarily for two reasons. First, the statutory innocent owner provision differed based on what type of property was seized. Second, with

45. *Id.* at 456 (Thomas, J., concurring).

46. *Id.* at 458 (Stevens, J., dissenting).

47. Stephen Chapman, *Almost-Blind Justice: Sometimes, Even the Innocent are Guilty*, CHI. TRIB., Mar. 7, 1996, at 27.

48. *Scales v. United States*, 367 U.S. 203, 224 (1961). Blackstone’s discussion of criminal law contains the oft-cited phrase that “to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.” 4 BLACKSTONE, *supra* note 9, at 21. Under Blackstone’s reasoning, guilt is also personal since it is not possible for an individual who has not personally acted to be punished since the unlawful act is missing. Though Blackstone speaks specifically to criminal law, the relationship between civil and criminal proceedings is addressed *infra*. See *infra* notes 73-93 and accompanying text.

49. *Bennis*, 516 U.S. at 466 (Stevens, J., dissenting).

50. See Barclay Thomas Johnson, *The Severest Justice is Not the Best Policy: The One Strike Policy In Public Housing*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 234, 263 (2001) (arguing that it violates substantive due process rights to evict (or in this case forfeit) leaseholds (in this case other property) based on third-party criminal activity).

51. *Rucker v. Davis*, 237 F.3d 1113, 1125 (9th Cir.) (en banc), *reversed*, Dep’t of Housing and Urban Development v. *Rucker*, 122 S. Ct. 1230 (2002) (reversing on all grounds but not dealing with *Bennis v. Michigan*).

respect to real property, the circuits were split on what § 881(a)(7)'s innocent owner defense actually required.

As to the first reason, prior to its amendment in 1988, with respect to conveyances, a number of courts held that to come within § 881(a)(4)(B)'s innocent owner provision⁵² the conveyance must be stolen or otherwise unlawfully in the user's possession. It was thus not enough that the owner did not know of, or consent to, the use.⁵³ The difference between this and the innocent owner defense for real property is that *most* courts allow an innocent owner to establish his or her claim by showing lack of knowledge *or* consent.⁵⁴

52. After the 1988 amendment, § 881(a)(4) had three provisions exempting (A) common carriers, (B) stolen conveyances, and (C) innocent owners:

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

53. The different interpretations are apparently based on the wording and punctuation of §§ 881(a)(4)(C) and 881(a)(7). Section 881(a)(4)(C) protected owners whose conveyances were used "without the knowledge, consent, or willful blindness of the owner." In contrast, § 881(a)(7) protected owners whose property was involved in criminal acts "committed or omitted without the knowledge or consent of that owner." The different interpretation is dubious for three reasons. First, the "or" of § 881(a)(4)(C) should be read disjunctively because, like § 881(a)(7), which has no willful blindness requirement, the "or," in the absence of the willful blindness requirement, would then fall between "knowledge" and "consent" as it does in § 881(a)(7). Moreover, the "or willful blindness" requirement is, of itself, a heightened burden on the owner that independently, and in conjunction with knowledge or consent, raises the burden on the owner to almost a negligence standard. Second, a number of courts have read § 881(a)(7) to include a negligence standard that is not unlike the "willful blindness" requirement. Thus, even if lack of knowledge or, more typically, lack of consent is proved, the owner must prove he or she did all that would reasonably be expected to prevent the acts. Since § 881(a)(7), a clearly disjunctive provision, is reasonably read to include a negligence standard, § 881(a)(4)(C) with its already present negligence or "willful blindness" standard, should be read that way as well. Finally, the conjunctive reading of § 881(a)(4)(C) would make it merely redundant. If an owner can only save his or her conveyance by proving he or she did not know, consent, and was not willfully blind of the use, he or she can essentially save the conveyance only if it was stolen. Such an interpretation would mean § 881(a)(4)(C) is superfluous since § 881(a)(4)(B) already covers that situation.

54. See *infra* note 62 and accompanying text.

This interpretation of the initial § 881(a)(4) statute was followed in *United States v. "Monkey."*⁵⁵ In that case, the Fifth Circuit held that it was not enough that the property, in this case a fishing boat named "Monkey," was used for an unauthorized purpose (to carry drugs); the user's possession must also be unlawful.⁵⁶ Hence, any time the conveyance is given to the party (even if the use exceeds the conditions under which it is given) the use is lawful. Despite this rather harsh interpretation, § 881(a)(4) was occasionally interpreted, based on *Calero-Toledo's* dicta, to allow an innocent owner to avoid forfeiture if he or she proved that he or she was uninvolved with and unaware of the wrongful activity, and did all that could reasonably be expected to avoid the illegal use of the vehicle.⁵⁷ This interpretation was, more or less, included when § 881(a)(4) was amended in 1988 to add subparagraph (C), which protects owners whose conveyances are used "without the knowledge, consent, or willful blindness of the owner."⁵⁸ Since its addition to the statutory scheme, § 881(a)(4)(C) has typically been interpreted to provide the same protections as § 881(a)(7),⁵⁹ raising the question: what protection did that provision actually provide?

The innocent owner defense provided in § 881(a)(7) has split the circuits and even split courts within some circuits.⁶⁰ The specific language provides for the forfeiture of "[a]ll real property . . . (including any leasehold interest) . . . except that no property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."⁶¹ The disagreement concerns the language "committed or omitted without the knowledge *or* consent of that owner," and whether that language should be read disjunctively (as opposed to conjunctively), and whether the provisions should be interpreted to include a negligence standard. The greater number of courts answered both questions in the affirmative.

Thus, the weight of authority held that under § 881(a)(7) an owner could avoid forfeiture by proving that he or she either did not have actual knowledge of the activities or, if he or she did have knowledge, did not consent.⁶² Further,

55. 725 F.2d 1007 (5th Cir. 1984).

56. *Id.* at 1012.

57. *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 762 (8th Cir. 1986).

58. 21 U.S.C. § 881(a)(4)(C) (1999).

59. *See, e.g., United States v. One 1985 Mercedes Benz Auto.*, 716 F. Supp. 211 (E.D. N.C. 1989).

60. Thus, the Eleventh Circuit felt compelled to observe that with regard to whether § 881(a)(7) should be read conjunctively or disjunctively, "[t]he law in this circuit is not clear." *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1452 (11th Cir. 1995). Noting that "Eleventh Circuit case law is less than clear on whether a disjunctive or conjunctive reading applies to the 'without knowledge or consent' language of the innocent-owner defense," the Eleventh Circuit embraced the disjunctive reading of the old § 881(a)(7) late in 2001. *United States v. Cleckler*, 270 F.3d 1331, 1334 (11th Cir. 2001).

61. 21 U.S.C. § 881(a)(7) (2000).

62. *See, e.g., United States v. 121 Allen Place*, 75 F.3d 118 (2d Cir. 1996); *United States*

most courts hold that an owner must also not engage in willful blindness⁶³ and that he or she must have done "all that reasonably could be expected to prevent the illegal activity once he [or she] learned of it."⁶⁴ The negligence standard seems to come from *Calero-Toledo* where, in dictum, the Court noted that there might be constitutional questions raised by the forfeiture of "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."⁶⁵ Notwithstanding this majority position, at least one circuit adopted the conjunctive reading that lack of both knowledge *and* consent must be proved by the person claiming innocent owner status.⁶⁶ That the Reform Act adopts the majority position suggests that this position is the one Congress originally intended and recommends further analysis to be provided in Parts III and IV.

C. Burden of Proof

Other than the innocent owner questions, perhaps the most problematic pre-Reform Act part of the civil forfeiture statute was the inequitable burden of proof. Under this scheme, all property was deemed forfeit once the government showed probable cause that the property was used to facilitate a narcotics crime or was derived from a narcotics crime. Since probable cause could be established with as little as a confidential informant's tip, the potential for abuse and disastrous consequences was staggering. For example, in Boston, thirteen members of the S.W.A.T. team raided Rev. Accelynne Williams' apartment

v. 1012 Germantown Rd., 963 F.2d 1496 (11th Cir. 1992); *United States v. 7326 Highway 45 N.*, 965 F.2d 311, 315 (7th Cir. 1992) (noting the circuits are split but taking no position); *United States v. 141st St. Corp.*, 911 F.2d 870 (2d Cir. 1990); *United States v. 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989); *United States v. Lots 12, 13, 14, & 15, Keeton Heights Subdivision*, 869 F.2d 942, 947 (6th Cir. 1989) (holding also that a negligence standard does not apply).

63. *E.g.*, *United States v. Milbrand*, 58 F.3d 841, 844 (2d Cir. 1995).

64. *141st St. Corp.*, 911 F.2d at 878-79 (noting that the disjunctive reading was the only logical one because in order to consent (or not consent) to the narcotics activity, an individual must have actual knowledge of it). *See also* *United States v. 418 57th St.*, 922 F.2d 129, 132 (2d Cir. 1990) (consent is "failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use"); *United States v. 15621 S.W. 209th Ave.*, 699 F. Supp. 1531, 1534 (S.D. Fla. 1988), *aff'd*, 894 F.2d 1511 (11th Cir. 1990) (an innocent owner is one who did not know of the property's connection to drug trafficking and took every reasonable precaution to prevent the property's use in drug trafficking). *But see* *Lots 12, 13, 14, & 15, Keeton Heights Subdivision*, 869 F.2d at 947 (negligence standard does not apply).

65. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974).

66. *United States v. 10936 Oak Run Circle*, 9 F.3d 74, 76 (9th Cir. 1993) (knowledge that property was acquired through drug proceeds bars owner from asserting innocent owner defense); *United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (a district court in *United States v. 5935 Acres of Land*, 752 F. Supp. 359, 362 (D.C. Haw. 1990), later described the holding as dictum).

searching for drugs and guns, but found none.⁶⁷ Rev. Williams, who was seventy-five years old, died of a heart attack after being “secured” on the floor by three police officers. As it turned out, the confidential informant who provided the probable cause had been drunk the night he visited a drug den and was mistaken about the identity and location of the malefactors. The police, of course, not being required to meet a higher standard of proof than probable cause, did not investigate further.⁶⁸ Had Rev. Williams survived, the burden would have been on him to prove that his property was not subject to forfeiture.

This low burden of proof and the use of confidential informants presents other problems for those challenging the seizures. Thus, with respect to testimony before the House Judiciary Committee concerning the civil forfeiture laws, one House Report noted

[t]he Committee has heard testimony from the executor of an estate who was placed, along with the beneficiaries of a house, in the position of having to fight a seizure based on “an unnamed person in prison (having) told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of the decedent . . . on an unspecified date in December 1988.”⁶⁹

In such a situation, the familiar problem of proving a negative becomes nearly insurmountable. It is much easier for the government to prove that such an event *might* (the statute only required probable cause) have happened than for the owner to prove, by a preponderance of evidence, that this chain of events never happened. The situation also raises the question of whether such a standard is constitutionally adequate.

The Second Circuit addressed this question specifically when it observed, “*Good* and *Austin* reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant in rem allowing seizure—probable cause—suffices to meet the requirements of due process.”⁷⁰ The Civil Asset Forfeiture Reform Act addresses the burden of proof concerns by raising the government’s burden to a preponderance of the evidence. This Note revisits the due process concerns raised by the burden of proof allocations

67. HYDE, *supra* note 9, at 47-48 (Rep. Hyde collects a number of other horror stories).

68. See Sara Rimer, *Minister Who Sought Peace Dies in a Botched Drug Raid*, N.Y. TIMES, Mar. 28, 1994, at A4.

69. H.R. Rep. No. 106-192, at 1b n.67 (referring to *United States v. Good*, 510 U.S. 43 (1993); *Austin v. United States*, 509 U.S. 602 (1993)).

70. *United States v. 194 Quaker Farms Rd.*, 85 F.3d 985, 990 (2d Cir.), *cert. denied*, 519 U.S. 932 (1996). *Accord* *United States v. \$49,576.00 U.S. Currency*, 116 F.3d 425 (9th Cir. 1997) (quoting *194 Quaker Farms Rd.*, 85 F.3d at 990); *United States v. Four Contiguous Parcels of Real Property*, 1999 WL 701914 (6th Cir. 1999) (Clay, J., dissenting) (“Because I believe that the allocation of the burden of proof in a civil forfeiture case under 19 U.S.C. § 1615 [a similar statute] violates the Due Process Clause of the Fifth Amendment, I respectfully dissent.”). *But see* *United States v. \$129,727.00 U.S. Currency*, 129 F.3d 486 (9th Cir. 1997) (rejecting as dictum the circuit’s earlier statements in *\$49,576.00 U.S. Currency*).

in Part IV.C.

D. Eighth Amendment's Excessive Fines Clause

Another area of confusion in the civil forfeiture laws is the role of the Eighth Amendment's Excessive Fines Clause.⁷¹ The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁷² The forfeiture of significant property interests for minor narcotics crimes can raise Excessive Fines Concerns. Information presented and analyzed in this section will be raised again in Part IV, where this Note will discuss why the Reform Act does not fully address Eighth Amendment concerns.

When a relatively minor narcotics crime leads to civil forfeiture proceedings, especially where the government proceeds against a primary residence, an analysis of whether the forfeiture is constitutionally excessive is appropriate. This vein of analysis has had a fitful and confusing existence in civil forfeiture law for three major reasons. First, courts have only rarely struck down a forfeiture as excessive, making it difficult to know where the lines are drawn. Second, it was, for many years, not clear that the Excessive Fines Clause applied at all to civil forfeiture. Third, because the Supreme Court has not specified a

71. The Eighth Amendment is lifted almost verbatim from the English Bill of Rights granted on William and Mary's accession to the English throne in 1689, following the Glorious Revolution. 5 THE FOUNDER'S CONSTITUTION 369 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting Bill of Rights, 1 W. & M., c.2, § 10 (Eng.)) ("That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."). This section of the English Bill of Rights seems to have originated in the *Case of Titus Oates* where Titus was sentenced to the following punishments for perjury: a fine of 1000 marks on each indictment; to be stripped of his Canonical Habits; stand in the Pillory and walk around Westminster declaring his crime with a bag over his head; stand in the Pillory again a week later, be whipped from Aldgate to Newgate on a Wednesday, be whipped from Newgate to Tyburn by the hangman (on Friday); and stand in the Pillory every April 24 for the rest of his life, stand in the Pillory every August 9 for the rest of his life, stand in the Pillory every August 10 for the rest of his life, stand in the Pillory on August 11 for the rest of his life, and stand in the Pillory on September 2 for the rest of his life. The dissenting Lords found

the said judgments [to be] barbarous, inhuman, and unchristian . . . It is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled . . . whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.

Id. at 368 (quoting 10 How. St. Tr. 1079, 1316 (K.B. 1685)). That Mr. Oates' sentence was cruel is difficult to dispute; it was also literally rather unusual given that he was required to "for an hour's time, between the hours of 10 and 12; with a paper over your head (which you must first walk with round about to all the Courts of Westminster-hall) declaring your crime." *Id.* (quoting *Case of Titus Oates*, 10 How. St. Tr. at 1316).

72. U.S. CONST. amend. VIII.

test for what constitutes an excessive fine, there is no consensus as to what test should be used to determine whether a forfeiture violates the Excessive Fines Clause.

As noted, courts have been extremely reluctant to strike down forfeitures and have used any number of reasons to uphold them. Thus, in *United States v. 38 Whalers Cove Drive*, the court allowed the forfeiture of a \$145,000 condominium (in which the plaintiff had \$68,000 in equity) based on one \$250 drug sale.⁷³ The court noted that “[t]he Eighth Amendment proscribes only extreme punishments. Even assuming that the entire amount of the forfeiture here is punishment, it does not violate the outer confines set by the Eighth Amendment.”⁷⁴ The court reasoned that the fine was not excessive since the claimant could have faced fines ranging from \$50,000 (under New York law) to \$1 million (under federal law). However, the court in *Whalers Cove* did find that the Eighth Amendment applied to civil forfeiture, which the Supreme Court affirmed the following year in *United States v. Austin*.⁷⁵

In *Austin*, the Supreme Court held that “forfeiture generally and statutory *in rem* forfeiture in particular, historically have been understood, at least in part, as punishment”⁷⁶ and that “[w]e therefore conclude that forfeiture under these provisions constitutes ‘payment to a sovereign as punishment for some offense,’ and, as such, is subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.”⁷⁷ In *Austin*, the claimant’s autobody shop and mobile home were subject to forfeiture following his conviction for possessing cocaine with intent to distribute. Although the Supreme Court found that the Excessive Fines Clause was applicable, it chose not to set forth a multifactor test for what is excessive, saying that “[p]rudence dictates that we allow the lower courts to consider that question in the first instance.”⁷⁸

Because the majority refused to set a test, Justice Scalia’s concurring opinion, which is one of the Supreme Court’s few pronouncements on the subject, has been particularly important in post-*Austin* Excessive Fines Clause civil forfeiture jurisprudence. Justice Scalia thought that some guidance was in order for the lower courts because *in rem* forfeiture has a unique relationship to the property that was unlike the traditional Excessive Fines analysis for monetary fines and *in personam* forfeiture. Thus, Justice Scalia said the test of excessiveness for statutory *in rem* forfeitures should focus “not [on] how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.”⁷⁹ This test has been described as an instrumentality test and is based on the notion that *in rem* forfeiture proceeds

73. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1991).

74. *Id.* at 38.

75. 509 U.S. 602 (1993).

76. *United States v. Austin*, 509 U.S. 602, 618 (1993).

77. *Id.* at 622 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

78. *Id.* at 622-23 (emphasis omitted).

79. *Id.* at 628 (emphasis omitted) (Scalia, J., concurring).

against property using the fiction that the property is guilty of the offense. Thus, it mattered not whether the property was expensive and the offense small, but rather whether the property was actually involved.⁸⁰

A second, oft-cited Supreme Court case dealing with forfeiture and the Excessive Fines Clause is *United States v. Bajakajian*.⁸¹ *Bajakajian* simultaneously complicates and clarifies the analysis for several reasons. First, though *Bajakajian* was resolved under the Excessive Fines clause, it arose under criminal forfeiture statutes and under different factual circumstances.⁸²

In *Bajakajian*, customs inspectors discovered Hosep Bajakajian and his family preparing to board an international flight with \$357,144 in U.S. currency that Bajakajian failed to report as required under 31 U.S.C. § 5316(a)(1)(A).⁸³ Although it is legal to transport that amount, or any amount, of currency, it is illegal to fail to report the transport of more than \$10,000 in "monetary instruments." The funds involved in such a failure to report are then subject to forfeiture under 18 U.S.C. § 982(a)(1).⁸⁴ Though Bajakajian pled guilty to the offense, the government did not seek to punish him criminally and instead proceeded against the money under 18 U.S.C. § 982(a)(1). The district court found that all \$357,144 was involved in the offense, and therefore subject to forfeiture, but held that "such forfeiture would be 'extraordinarily harsh' and 'grossly disproportionate to the offense in question,' and that it would therefore violate the Excessive Fines Clause."⁸⁵ The district court therefore ordered forfeiture of only \$15,000, which the court of appeals affirmed.⁸⁶ The Supreme Court affirmed the court of appeals decision holding that "a punitive forfeiture

80. An important point, to be sure. But, after all, it is the *Excessive Fines Clause* that is at issue. As this section suggests, this means that a proportionality inquiry is necessary as well. See *infra* notes 118-19 and accompanying text.

81. 524 U.S. 321 (1998).

82. The funds were lawfully acquired and were being transported to repay a lawful debt. The district court also found that Bajakajian "failed to report that he was taking the currency out of the United States because of fear stemming from 'cultural differences': [Bajakajian was] a member of the Armenian minority in Syria, [and] had a 'distrust for the Government.'" *Id.* at 326.

83. 31 U.S.C. § 5316(a)(1) (1994) requires that
a person or an agent or bailee of the person shall file a report . . . when the person, agent, or bailee knowingly—(1) transports, is about to transport, or has transported, monetary instruments of more than \$10,000 at one time—(A) from a place in the United States to or through a place outside the United States.

Id.

84. 18 U.S.C. § 982(a)(1) (2000) provides,
(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section . . . 5316 . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

Id.

85. *Bajakajian*, 524 U.S. at 326.

86. *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996).

violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."⁸⁷

Second, the Court's emphasis on the instrumentality distinction is crucial, but not readily elucidated—especially since the holding identifies proportionality as the sole test to be used. Justice Thomas, writing for the majority, observed that the proceeding was against Bajakajian himself and was not an *in rem* suit against the money. Thus, the money that would have been forfeited was not necessarily the specific money (i.e., the instrumentality) involved in the offense (as would be a car involved in a drug transaction or the property on which marijuana was grown in *United States v. Milbrand*⁸⁸). Any instrumentality inquiry was, for this reason, entirely beside the point. Further, in this case, the forfeiture was the only punishment because no severe criminal punishment was sought by the government.⁸⁹ This is unlike other narcotics-related forfeitures where the forfeiture might be a secondary punishment.⁹⁰ At most, the case suggests proportionality is the sole test for cases such as *Bajakajian*, where the proceeding is *in personam* and forfeiture does not necessarily involve an instrumentality of the crime. Even the majority in *Bajakajian* recognized that ordinarily an instrumentality inquiry is so important that “[a] forfeiture that reaches beyond this strict historical limitation [of the instrumentality inquiry] is ipso facto punitive and therefore subject to review under the Excessive Fines Clause.”⁹¹

Third, the opinion, when left unexamined, strongly suggests that an excessive fines inquiry should consider only proportionality. In fact, the Court held, “We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.”⁹² Thus, but for the differences suggested, the case strongly suggests that an excessive fines analysis should include both a proportionality and an instrumentality inquiry. Because this case was not a statutory *in rem* proceeding, however, it ultimately does not answer or clarify the Court's position on what test is appropriate for excessive fines inquiries in statutory *in rem* forfeitures. Nor does *Bajakajian* address Justice Scalia's point in *Austin* that an Excessive Fines analysis should

87. *Bajakajian*, 524 U.S. at 334.

88. 58 F.3d 841, 848 (2d Cir. 1995) (holding that forfeiture of an eighty-five acre parcel of land owned by offender's mother did not violate the Excessive Fines Clause because value of property forfeited was not excessive in comparison to the offense (1362 marijuana plants found on property), there was a close relationship between the offense and the property, and the mother “would have to have been blind not to have been aware of her son's marijuana activities”).

89. The government decided not to press for severe criminal sanctions and sought instead to take possession of Bajakajian's \$357,144, which raises the specter of improper motivation. The distinction the majority seems to have been driving at was between civil *in rem* forfeitures and criminal forfeitures.

90. See *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1100 (10th Cir. 2002) (“There are significant distinctions between *Bajakajian* and [civil forfeiture cases].”).

91. *Bajakajian*, 524 U.S. at 333 n.8 (emphasis omitted).

92. *Id.* at 334.

consider only instrumentality.⁹³

Finally, the composition of the *Bajakajian* majority (Justice Thomas joined the "liberal" wing of the Court as the fifth vote) muddies the waters when one tries to predict what the Court might decide under § 881(a). Whether the Court will be willing to find an Excessive Fines Clause violation in a case involving drug dealers as opposed to oppressed immigrants is an open question.

Given the lack of clarity (or void⁹⁴) in the Supreme Court's analysis of the proper manner by which to analyze a forfeiture under the Excessive Fines Clause, it is not surprising that the lower courts are split on what test is applicable when a challenge is raised to a forfeiture under the Eighth Amendment. The split has largely centered on Justice Scalia's concurring opinion in *Austin* where he sets forth an instrumentality test.⁹⁵ The courts have largely moved away from such a single-minded approach that focuses solely on either instrumentality or proportionality. For instance, the Tenth Circuit thought it necessary to "supplement" the "*Bajakajian* standard" and add a "factually intensive" inquiry that focused on the property's role as an instrumentality in the crime.⁹⁶ The majority of courts make use of some form of multi-factored test often combining (implicitly or explicitly) instrumentality with proportionality.

At least six circuits have adopted some version of a test that combines instrumentality and proportionality in a multifactored balancing test. The test typically considers:

- (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.⁹⁷

The test offered by the court in *Milbrand* is a nuanced one that offers clear advantages over a test inquiring solely into instrumentality or proportionality.

93. *United States v. Austin*, 509 U.S. 602, 628 (1993) (Scalia, J., concurring).

94. *Wagoner County Real Estate*, 278 F.3d at 1091 n.7. The rule of law would benefit from a clear rule from the Court on how to deal with these cases. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

95. *Austin*, 509 U.S. at 608 (Scalia, J., concurring).

96. *Wagoner County Real Estate*, 278 F.3d at 1191.

97. *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995). See also *Wagoner County Real Estate*, 278 F.3d at 1091; *United States v. 3819 N.W. Thurman St., Portland, Ore.*, 164 F.3d 1191 (9th Cir. 1999); *United States v. 25 Sandra Court*, 135 F.3d 462 (7th Cir. 1998); *United States v. 6040 Wentworth Ave. S.*, 123 F.3d 685 (8th Cir. 1997); *United States v. N. Half of the Southwest Quarter of Section Thirteen*, 106 F.3d 336 (10th Cir. 1997); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. RR #1*, 14 F.3d 864 (3d Cir. 1994).

For its part, the Fourth Circuit has endorsed the instrumentality approach following both *United States v. Austin* and *United States v. Bajakajian*. In *United States v. Chandler*,⁹⁸ the court held that a “three-part instrumentality test . . . considers (1) the nexus between the offense and the property and the extent of the property’s role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder.”⁹⁹ The Fourth Circuit also enunciated five factors that courts might also take into account during such an inquiry:

- (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.¹⁰⁰

The court’s endorsement of the instrumentality test rested heavily on Justice Scalia’s concurrence in *Austin*. The court brushed aside concerns about excessiveness, saying “a concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from nonimplicated property, when the offending property is readily separable.”¹⁰¹ The court apparently drew its inspiration for this suggestion from Justice Scalia’s concurrence in *Austin*, where he observed that

[e]ven in the case of deodands, juries were careful to confiscate only the instrument of death and not more. Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death.¹⁰²

98. 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995). A common misperception is that *United States v. Shifflett*, No. 97-4021, 1998 U.S. App. LEXIS 23908 (4th Cir. Sept. 24, 1998), an unpublished opinion, overrules *Chandler*. It does not because *Shifflett* deals with *in personam* criminal forfeitures pursuant to 21 U.S.C. § 853(a) and is therefore clearly distinguishable from *Chandler*. *Id.* at *17. In a later opinion, *United States v. Ahmad*, 213 F.3d 805 (4th Cir.), *cert. denied*, 531 U.S. 1014 (2000), the Fourth Circuit endorsed the instrumentality approach and distinguished *Bajakajian* saying that “not only did the *Bajakajian* Court recognize as the well-established rule that true civil in rem instrumentality forfeitures are exempt from the excessive fines analysis, but it also did nothing to change or limit this rule.” *Id.* at 814.

99. *Chandler*, 36 F.3d at 365.

100. *Id.*

101. *Id.* at 364. The court finally noted that “to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.” *Id.* at 365.

102. *United States v. Austin*, 509 U.S. 602, 628 (1993) (citing 1 BLACKSTONE, *supra* note

The suggestion, as innovative as it is, seems fairly inapplicable to the whole of civil forfeiture, where parcels of property, cash and cash equivalents, and conveyances are at issue. It is one thing to take only the wheel of an immobile cart (or, say, a tractor today), but it is an entirely different matter to attempt to divide a parcel of property (or bank account) partially tainted by drug money that the government seeks to declare forfeit under § 881(a).¹⁰³ It is unclear how the Fourth Circuit would deal with situations that are likely to arise today where each spouse has a property interest in property held in common. Such was not the case when the deodand was the method used to seize property.

The Fourth Circuit thought a proportionality prong was inapplicable because the Supreme Court had been only lukewarm about a strict proportionality inquiry, holding that “the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”¹⁰⁴ The Fourth Circuit also said that a proportionality inquiry was “not applicable when considering the excessiveness of a forfeiture of specifically identified property”¹⁰⁵ because the statute does not contain a limitation on the value of the property forfeited (unlike a fine or prison sentence), nor is such constitutional limitation supported by the history of the Eighth Amendment.¹⁰⁶

In a later opinion that followed *Bajakajian*, *United States v. Ahmad*,¹⁰⁷ the Fourth Circuit reaffirmed the supremacy of the instrumentality approach. Proportionality, the court thought, was simply not applicable wherever the property is an instrumentality. Notwithstanding *Bajakajian*’s admonitions that proportionality was proper way to judge an Excessive Fines Clause claim, the Fourth Circuit distinguished the case because the forfeiture “did not constitute an instrumentality forfeiture.”¹⁰⁸ Therefore, said the court, “not only did the *Bajakajian* Court recognize as the well-established rule that true civil in rem instrumentality forfeitures are exempt from the excessive fines analysis, but it also did nothing to change or limit this rule.”¹⁰⁹ Thus, at least in the Fourth Circuit, whenever the property is an instrumentality, a forfeiture can never be

9, at 301-02) (Scalia, J., concurring).

103. See, for example, the messy case of *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990), in which the court labored to divide what part of a marital estate an innocent spouse was entitled to and just how to divide and secure the government’s interest in the forfeited part of the estate.

104. *Chandler*, 36 F.3d at 365 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (holding that a life sentence without possibility of parole for possession of 672 grams of cocaine was not constitutionally infirm under the Eighth Amendment)).

105. *Id.* at 365-66.

106. *Id.* at 366.

107. 213 F.3d 805 (4th Cir.), *cert. denied*, 531 U.S. 1014 (2000).

108. *Id.* at 814.

109. *Id.*

excessive.¹¹⁰

In contrast to the Fourth Circuit, the Eleventh Circuit held in *United States v. 427 & 429 Hall Street*,¹¹¹ that “the appropriate inquiry with respect to the Excessive Fines Clause is, and is only, a proportionality test.”¹¹² The court looked as far back as the Magna Carta¹¹³ to find that a proportionality prong was necessarily a part of any excessive fines analysis. Based on this history, a court should ask: “Given the offense for which the owner is being punished, is the fine (imposed by civil forfeiture) excessive?”¹¹⁴

The multifactor test is the superior one. The test inquires into the two important prongs (instrumentality and proportionality) to provide those constitutionally based protections that are necessary. The instrumentality inquiry is necessary because, as Justice Scalia observed in *Austin*, modern civil forfeiture is based on the fiction that the object proceeded against is guilty of the crime (which is based on the deodand). Given this fiction, it thus makes little sense to allow the government to proceed against property that was not involved in the crime (i.e., was not an instrumentality). Hence, even the Supreme Court in *Bajakajian* observed that “[a] forfeiture that reaches beyond this strict historical limitation [of the instrumentality inquiry] is ipso facto punitive and therefore subject to review under the Excessive Fines Clause.”¹¹⁵ One might argue, as did the Eleventh Circuit in *United States v. 427 & 429 Hall Street*, that an instrumentality inquiry is inherent in the statute and therefore unnecessary under an Excessive Fines Clause inquiry.¹¹⁶ The point is well taken; nonetheless, the inquiry for whether a deprivation of a property interest is constitutionally valid is determined not by the content of the statute, but by the Constitution itself.¹¹⁷

110. The *Ahmad* Court did hold, in the alternative, that the forfeiture was not “grossly disproportional.” *Ahmad*, 213 F.3d at 815.

111. 74 F.3d 1165 (11th Cir. 1996). *Accord* *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304 (11th Cir. 1999).

112. 74 F.3d at 1170.

113. Section 20 of the Magna Carta provides that:

A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villain shall be amerced saving his wainage; if they fall into our merch. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

J.C. HOLT, *MAGNA CARTA* 457 (2d ed. 1992).

114. *427 & 429 Hall St.*, 74 F.3d at 1172.

115. *United States v. Bajakajian*, 524 U.S. 321, 333 n.8 (1998) (emphasis added).

116. *See 427 & 429 Hall St.*, 74 F.3d at 1171 n.9 (observing that an instrumentality test is unnecessary because § 881(a)(7) only authorizes the forfeiture of property “‘which is used, or intended to be used, in any manner or part’ to facilitate a violation of the Controlled Substances Act.”).

117. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985) (citing *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring) (“As our cases have

A proportionality inquiry is also necessary because a forfeiture that passes the instrumentality test might well be unconstitutional because it is grossly disproportionate to the crime. Such a scenario is easy to imagine when a relatively minor crime involves a very valuable piece of property. That a proportionality prong is necessary and required under the Excessive Fines Clause is eminently logical—it is, after all, the *Excessive Fines Clause*. The multifactor balancing test would then inquire into both prongs, as did the Second Circuit's version of that test in *Milbrand*:

(1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.¹¹⁸

In civil forfeiture proceedings under § 881(a), using only a proportionality inquiry is not enough because the proceedings are not merely punitive. Civil forfeiture is also remedial and preventative. A forfeiture strikes at the instrumentalities used to facilitate criminal activity and thus attempts to prevent future criminal activity. A forfeiture is remedial because, to some extent, it compensates for the crimes already committed. Hence, the House Judiciary Committee noted:

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut [the illegal activity] down.¹¹⁹

When forfeitures are explicitly aimed at the instrumentalities of the crime in an effort to prevent future crimes and remedy past wrongs, an instrumentality inquiry is necessary. In such a case, a forfeiture could be "excessive" within the

consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.")).

118. *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995). *See also* *United States v. Wagoner County Real Estate*, 278 F.3d 1091 (10th Cir. 2002); *United States v. 3819 N.W. Thurman St.*, 164 F.3d 1191 (9th Cir. 1999); *United States v. 25 Sandra Court*, 135 F.3d 462 (7th Cir. 1998); *United States v. 6040 Wentworth Ave. S.*, 123 F.3d 685 (8th Cir. 1997); *United States v. N. Half of the Southwest Quarter of Section Thirteen*, 106 F.3d 336 (10th Cir. 1997); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. RR #1*, 14 F.3d 864 (3d Cir. 1994).

119. H.R. REP. NO. 106-192, at 4 (1999).

meaning of the Excessive Fines Clause either because it is grossly disproportionate, or because there is little or no nexus between the offense and the property—a two-pronged inquiry is therefore necessary.

E. Problematic Motivations

The next criticism often leveled against the civil forfeiture laws is the problematic motivations the government faces when it is permitted to keep the property it proceeds against.¹²⁰ Courts and commentators have worried that the government may be tempted to “fill its coffers” by seizing property for minor offenses.¹²¹ Thus, Justice Thomas observed in *Bennis v. Michigan* that “[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”¹²² That the government actually views civil forfeiture as a way to increase revenue is reflected by a 1990 memo sent by the U.S. Attorney General to U.S. Attorneys regarding the increase of forfeitures to reach budgetary projections. The memo noted, “[w]e must significantly increase production to reach our budget target.”¹²³ Justice Thomas, it seems, was not far from the truth.¹²⁴

120. Even in mainstream media the issue arises. Hence, on the television drama *J.A.G.*, when Admiral Chegwiddden’s car is found to contain enough drugs to be subject to civil forfeiture (he loaned it to a love interest’s son), he asks a subordinate what the police department used to do with seized vehicles when the subordinate was a police officer. The reply was that they sold them to his brother in-law (the sheriff) for \$500. *J.A.G.: The Princess and the Petty Officer* (CBS television broadcast, Nov. 14, 2000) (*J.A.G. Episode Guide*, available at <http://www.paramount.com/television/jag/episodeguide/index.htm>).

121. *Rucker v. Davis*, 237 F.3d 1113, 1125 (9th Cir.) (en banc), *reversed*, Dep’t of Housing and Urban Development v. Rucker, 122 S. Ct. 1230 (2002).

122. *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

123. 38 United States Attorney’s Bulletin 180 (1990) (noting that “the President’s budget for FY 1990 projects forfeiture deposits of \$470 million. Through the first nine months of the year, deposits total \$314 million. We must significantly increase production to reach our budget target.”).

124. At the local level, this desire to raise funds using civil forfeiture has had literally deadly consequences. For instance, in California, Donald Scott was shot and killed by police raiding his ranch in Malibu. The police were allegedly searching for marijuana plants, but found none. The District Attorney for Ventura County later concluded that “the Los Angeles County Sheriff’s Department was motivated, at least in part, by a desire to seize and forfeit the ranch for the government.” Office of the District Attorney, Ventura County, Cal., *Report on the Death of Donald Scott*, Mar. 30, 1993, at 61, available at <http://www.fear.org/chron/scott.txt>. Mr. Scott’s ranch was apparently worth some five million dollars. See also Michael Fessier, Jr., *Trail’s End Deep in a Wild Canyon West of Malibu, a Controversial Law Brought Together a Zealous Sheriff’s Deputy and an Eccentric Recluse. A Few Seconds Later, Donald Scott Was Dead*, L.A. TIMES MAGAZINE, Aug. 1, 1993, available at 1993 WL 2288211.

Given these concerns, it is not surprising to learn that forfeiture was traditionally viewed as one source of the king's revenue. Blackstone observes during his discussion of the king's revenue that "[t]he next branch of the king's ordinary revenue [consists] in forfeitures of lands and goods for offences."¹²⁵ This view seems to have carried over to the United States, and in 1998 the federal government seized \$449 million in assets and had \$1 billion on deposit.¹²⁶ As Part III shows, it is yet unclear to what extent the Reform Act deals with these issues.

III. THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000

A. Generally

That the federal civil forfeiture laws were ripe for reform should be obvious. The second major part of this Note focuses on the ultimate outcome of those reform efforts: the Civil Asset Forfeiture Reform Act of 2000,¹²⁷ sponsored by Rep. Henry Hyde. Rep. Hyde first introduced legislation to reform the statutory scheme in June of 1993,¹²⁸ which, coincidentally, was several months after the major newspaper in his district, *The Chicago Tribune*, began to raise questions about the propriety of civil forfeiture.¹²⁹ The bill was co-sponsored by, among others, Rep. Barney Frank (D-MA), and enjoyed wide bipartisan support and was endorsed by several groups, including the ABA, ACLU, and National Association of Criminal Defense Lawyers.¹³⁰ The ultimate outcome of these efforts was the Reform Act that became law in April 2000.

The Reform Act makes five important changes to the civil forfeiture laws that concern this Note.¹³¹ First, the Act contains new requirements that the government obey certain procedural norms and provides penalties for failure to

125. 1 BLACKSTONE, *supra* note 9, at 289.

126. H.R. REP. NO. 106-192, at 3 (1999). *See also* HYDE, *supra* note 9 (Rep. Henry Hyde notes many other abuses in his book). One might argue that this is a fairly small amount of money for the federal government and a sum that is fairly unlikely to give anyone motives to act improperly. That \$449 million is, after all, less than one-quarter of one-tenth of one percent of the United States' \$1.8 trillion budget (or roughly one-third of the cost of one Arleigh Burke Class Guided Missile Destroyer).

127. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000).

128. H.R. 2417, 103rd Cong. (1993).

129. *See, e.g.*, Stephen Chapman, *Seizing Property: Law Enforcement's Dangerous Weapon*, CHI. TRIB., Mar. 7, 1993, at 3; *What Other Newspapers are Saying*, CHI. TRIB., Feb. 27, 1993, at 21 (noting an article in the *Albuquerque Journal* entitled, *Innocent People Become Government Victims*, dealing with the excesses of civil forfeiture).

130. *See* Rhonda McMillion, *Fairness in Civil Forfeiture: ABA Backs Bill That Seeks to Avoid Punishing "Innocent" Property Owners*, 82 A.B.A. J. 102 (1996).

131. For a complete treatment of all the changes made by the Act see Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97 (2001).

obey these norms.¹³² For instance, within sixty days of the seizure the government must notify owners that their property has been seized and is subject to forfeiture. If the government does not notify the owners, the property must be returned.¹³³ These provisions include certain procedures that specifically deal with the seizure of real property¹³⁴ and that essentially codify the Supreme Court's decision in *United States v. Good*.¹³⁵ Thus, situations like Charlotte Juide's would no longer take place since, absent exigent circumstances, the government may not proceed against real property without first providing notice.¹³⁶ Importantly, the government may not deprive owners and occupants of their property prior to a judicial determination that the property is subject to forfeiture.¹³⁷

Second, the Act contains new provisions for appointing counsel for indigent defendants from the local legal services corporation.¹³⁸ Although the court is given discretion to appoint counsel in most cases, when the property in question is a primary residence the court is required to appoint counsel when "a person with standing to contest the forfeiture of property . . . is financially unable to obtain representation by counsel."¹³⁹ Importantly, when counsel is appointed, the government is required to pay "reasonable attorney fees and costs . . . regardless of the outcome of the case."¹⁴⁰

Third, the Act makes important changes to the burden of proof required to prove forfeiture.¹⁴¹ The government must now "establish, by a preponderance of

132. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No 106-185, § 2, 114 Stat. 202, 203 (2000) (codified as amended at 18 U.S.C. § 983(a)(1) (2000)).

133. *Id.* (codified as amended at 18 U.S.C. § 983(a)(1)(F) (2000)). See also provisions codified at 18 U.S.C. 983(e), which provide that a person may have a forfeiture set aside if the government "knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide that party with notice."

134. Pub. L. No. 106-185, § 7, 114 Stat. 202, 214-15 (2000) (codified as amended at 18 U.S.C. § 985 (2000)).

135. 513 U.S. 43 (1993).

136. But courts have typically been lax about applying notice provisions, and, in any event, the Reform Act allows forfeitures that have been judicially set aside for lack of notice to be refiled by the government. See 18 U.S.C. § 983(e)(2)(A) (2002); *United States v. Marolf*, 277 F.3d 1156 (9th Cir. 2002); *United States v. \$39,480 in the United States Currency*, 190 F. Supp. 2d 929 (W.D. Tex. 2002) (refusing to strictly construe ninety-day limit on filing of complaint for forfeiture where government filed notice one day late).

137. Pub. L. No. 106-185, § 7, 114 Stat. 202, 214-15 (2000) (codified as amended at 18 U.S.C. § 985 (2000)).

138. Pub. L. No 106-185, § 2, 114 Stat. 202, 205 (2000) (codified as amended at 18 U.S.C. § 983(b) (2000)).

139. *Id.* (codified as amended at 18 U.S.C. § 983(b)(2)(A) (2000)).

140. Pub. L. No 106-185, § 2, 114 Stat. 202, 205-6 (2000) (codified as amended at 18 U.S.C. § 983(c) (2000)).

141. Pub. L. No 106-185, § 2, 114 Stat. 202, 205 (2000) (codified as amended at 18 U.S.C. § 983(b)(2)(A) (2000)).

the evidence, that the property is subject to forfeiture.”¹⁴² Previously, as observed *supra*, the fact that the government was able to seize property on only probable cause caused many courts and commentators to question the constitutionality of the law.¹⁴³

Fourth, the innocent owner provision has been largely retained, but is set forth more explicitly.¹⁴⁴ As examined below, the Reform Act makes some attempt to clarify and elaborate the state of the law. Finally, the Reform Act contains provisions that allow a claimant to petition the presiding court for a determination of whether the forfeiture violates the Excessive Fines Clause of the Eighth Amendment.¹⁴⁵ The court is then required to reduce or eliminate the forfeiture if the claimant shows, by a preponderance of the evidence, that the forfeiture is “grossly disproportional.”¹⁴⁶

B. Cases and Commentary

Thus far, no particularly relevant cases dealing with the Act have been decided, with few notable exceptions. In *United States v. Duke*,¹⁴⁷ the Seventh Circuit observed that although the Civil Asset Forfeiture Reform Act fixes a five-year statute of limitations, this provision was not applicable to Duke’s case because the Reform Act applied only to proceedings commenced after August 23, 2000. In *United States v. Hooper*,¹⁴⁸ the court noted that the Reform Act establishes an exception for a primary residence but only if “the property is not, and is not traceable to, the proceeds of any criminal offense”¹⁴⁹—since the claimants property was the proceeds of criminal offenses.¹⁵⁰

There has been relatively little relevant commentary on the Reform Act. Brant C. Hadaway offers a somewhat pessimistic overview of the Civil Asset Forfeiture Reform Act.¹⁵¹ Hadaway’s study usefully examines the link between

142. *Id.* (codified as amended at 18 U.S.C. § 983(c)(1) (2000)).

143. *See supra* notes 69-71 and accompanying text.

144. Pub. L. No 106-185, § 2, 114 Stat. 202, 206 (2000) (codified as amended at 18 U.S.C. § 983(d) (2000)).

145. Pub. L. No 106-185, § 2, 114 Stat. 202, 209-10 (2000) (codified as amended at 18 U.S.C. § 983(g) (2000)).

146. Pub. L. No 106-185, § 2, 114 Stat. 202, 210 (2000) (codified as amended at 18 U.S.C. § 983(g)(4) (2000)).

147. 229 F.3d 627 (7th Cir. 2000).

148. 229 F.3d 818 (9th Cir. 2000).

149. *Id.* at 823.

150. Other notable cases deal with whether the Act should apply to pending cases commenced before the Act was passed and became effective. *Compare* *United States v. Section 9, Town 29 N., Range 1*, 241 F.3d 796 (6th Cir. 2001) (remanding case for application of Civil Asset Forfeiture Reform Act to case commenced before Act was passed), *with* *United States v. Lot Numbered One (1) of the Lavaland Annex*, 256 F.3d 949 (10th Cir. 2001) (rejecting application of Civil Asset Forfeiture Reform Act to case commenced before Act was passed).

151. Hadaway, *supra* note 25. *See also* Barry L. Johnson, *Purging the Cruel and Unusual:*

government overreaching in civil forfeiture cases and the monetary incentives the civil forfeiture system provides to government entities, especially the police. Hadaway concludes that “despite its laudable procedural reforms, [the Civil Asset Forfeiture Reform Act] leaves a lot of business yet to be done.”¹⁵² Ultimately, however, his suggestion that “ending the drug war . . . is the only rational way to reform civil asset forfeiture” belies the rather Libertarian point that private, “consensual behavior” cannot, or should not, be the basis for criminal wrongs.¹⁵³ While the “war on drugs” is increasingly recognized as a manifest failure, it seems exceedingly unlikely that politicians, or the public, will let go of their popular straw man, the drug dealer. With the wholesale disassembling of the “war on drugs” some distance in the future, meaningful reform can still strike at the improper incentives the civil forfeiture system gives to law enforcement agencies. Raising the burden of proof to clear and convincing evidence, as discussed *infra*, would go a long way towards limiting civil forfeiture’s use as a tool for raising revenue.¹⁵⁴ Completely cutting the financial cord between civil forfeiture and local law enforcement agencies is simply politically impractical and ultimately unwise. The U.S. Supreme Court has recognized that there is a legitimate reason to return seized property to the police:

[T]he Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways. The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government’s interest in using the profits of crime to fund these activities should not be discounted.¹⁵⁵

The link between the government and the profits from illegal activities should be regulated; it should not be abolished.

IV. WAYS IN WHICH THE CIVIL ASSET FORFEITURE REFORM ACT DOES AND DOES NOT SOLVE THE PROBLEMS IDENTIFIED

Rep. Hyde’s Civil Asset Forfeiture Reform Act is a major step forward. In many ways it cures or attempts to cure the most serious problems inherent in the civil forfeiture laws. However, in several ways it is unclear whether the Reform Act is up to the task of curing civil forfeiture’s ills.

The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian, 2000 U. ILL. L. REV. 461 (2000).

152. Hadaway, *supra* note 25, at 113.

153. *Id.*

154. See discussion *infra* Part IV.C.

155. Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 629 (1989) (citation and footnote omitted).

A. Problematic Motivations

First, the Reform Act does not specifically address the issue of the government's problematic motivations. There are, it is true, provisions in the Reform Act for "Enhanced Visibility of the Asset Forfeiture Program,"¹⁵⁶ which purport to raise civil forfeiture's profile in order to subject it to public and government scrutiny. Changes such as the new burden of proof and the requirement to pay the attorney fees and costs of indigent defendants will make civil forfeiture a less attractive option for government and should therefore cut back on any tendency by the government to use it as a way to "fill its coffers." Only time will tell if the Reform Act makes changes that sufficiently staunch the government's desire to seize property for its own gain.

B. Eighth Amendment's Excessive Fines Clause

Next, the Reform Act codifies an Eighth Amendment inquiry and places the burden of proof on the defendant to show, by a preponderance of the evidence, that the forfeiture was grossly disproportional to the gravity of the offense.¹⁵⁷ By basing the inquiry on a comparison of the gravity of the offense to the value of the property, the Reform Act resolves the circuit split in favor of using only a proportionality test to determine when a forfeiture is unconstitutional under the Eighth Amendment. As the Act stands now, however, it does not fully realize those protections that the Eighth Amendment affords citizens. Since the test announced by those circuits adopting a proportionality and instrumentality test is constitutionally mandated, those circuits should continue to use that test until the statutory scheme is amended.

A one-pronged proportionality test is appropriate only where, as in *Bajakajian*, the purpose of the civil forfeiture is to punish. Where the sole goal of the forfeiture proceeding is to punish, it makes sense that the only relevant question is: whether the fine is grossly disproportionate to the offense.¹⁵⁸ Further, in cases such as *Bajakajian*, the subject of the forfeiture is necessarily the object of the offense (hence, there is always a nexus between the crime and the property—an instrumentality inquiry is pointless in these cases). However, this same argument does not hold under civil forfeiture cases proceedings under § 881(a).

In proceedings under § 881(a), proportionality is not enough because the proceedings are not merely punitive, they are also remedial and preventative. Thus, the House Report on the Reform Act explicitly stated,

Forfeiture is also used to abate nuisances and to take the

156. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No 106-185, § 19, 114 Stat. 202, 223-24 (2000) (codified as amended at 28 U.S.C. § 524 (2000)).

157. Pub. L. No 106-185, § 2, 114 Stat. 202, 209-10 (2000) (codified as amended at 18 U.S.C. § 983(g) (2000)).

158. See *supra* text accompanying notes 88-89.

instrumentalities of crime out of circulation. If drug dealers are using a “crack house” to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut [the illegal activity] down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills.¹⁵⁹

Where forfeitures are explicitly aimed at the instrumentalities of the crime in an effort to prevent future crimes, and where the forfeiture is aimed at the instrumentalities or proceeds of the crime in an effort to remedy the wrongs done, an instrumentality inquiry is necessary. While the Judiciary Committee’s example of a crack house leaves little question as to whether the house is an instrumentality, the situation is often not so clear. More often, the forfeiture action involves property that had a fleeting association with the crime or was purchased with the proceeds of a crime. In these cases, the fine the government seeks to impose via civil forfeiture could be excessive either because it is grossly disproportionate, or because there is little or no nexus between the offense and the property. In the latter case, the instrumentality requirement serves to protect property not closely associated with the criminal offense (i.e., that property an individual could not reasonably suspect was subject to forfeiture).

C. Burden of Proof

Potentially, the most important part of the Reform Act is the change it makes to the government’s burden of proof. By requiring the government to meet a preponderance of the evidence standard, the Act makes it less likely that civil liberties will be infringed on the basis of an accusation made by a confidential informant. Thus, the changes to the Act remedy the most glaring inequities, but do not go far enough. In a country based on the cry of life, liberty, and property, it is surprising that, barely two centuries after its founding, the government should be able to deprive its citizens of their core constitutional right to property based on a mere preponderance of the evidence.¹⁶⁰ Further, the Supreme Court has recognized for more than a century that a forfeiture is “quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.”¹⁶¹ The *Boyd* Court noted that all

159. H.R. REP. NO. 106-192, at 4 (1999).

160. Rep. Henry Hyde first introduced legislation to reform the civil forfeiture laws in 1993 (H.R. 2417, 103d Cong. (1st Sess. 1993)). This version of the bill would have changed the burden of proof to clear and convincing evidence. H.R. 2417, 103rd Cong. § 4 (1st Sess. 1993).

161. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (citing *Boyd v. United States*, 116 U.S. 616, 634 (1886)). *Boyd* also stands for the rule that in such quasi-criminal actions that would deprive a person of significant property rights, our criminal constitutional protections apply.

"suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature."¹⁶² Given the punitive and quasi-criminal nature of civil forfeiture proceedings, a higher standard of proof is appropriate. The fact that a number of states have adopted such an approach suggests that higher burdens of proof do not overly burden police and prosecutors.

In both Nevada and Florida, the government is required to meet a higher standard than a mere preponderance of the evidence. The Nevada Supreme Court has held that in civil forfeiture cases the government's burden must be "[p]roof beyond a reasonable doubt . . . in order that the innocent not be permanently deprived of that property."¹⁶³ Such a statement hints at the *Matthews v. Eldridge*¹⁶⁴ inquiry that courts should engage in to determine whether more process is necessary before depriving an individual of his or her rights. Under *Matthews v. Eldridge*, a court considers:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁶⁵

Under the test, it is clear that the first prong weighs heavily in favor of additional procedure. The right to property (whether real property or chattels) is a fundamental one and one upon which this nation was established. In fact, property rights have often been considered the most fundamental right—the right on which all others are based.¹⁶⁶

Under the second prong, there is significant reason to believe that there is an unacceptable risk of error that exists that innocent parties will be deprived of property, and that raising the burden would mitigate this risk. It is not enough to say that those parties who really are innocent have an opportunity to prove their innocence because a negative is enormously difficult to prove. The difficulty of proving a negative essentially puts a much heavier burden of proof on the owner.¹⁶⁷ The burden should be on the government, and an innocent party should

162. *Boyd v. United States*, 116 U.S. 616, 634 (1886).

163. *A 1983 Volkswagen v. County of Washoe*, 699 P.2d 108, 109 (Nev. 1985).

164. 424 U.S. 319 (1976).

165. *Id.* at 335.

166. *See, e.g.*, JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* (1992); RICHARD PIPES, *PROPERTY AND FREEDOM* (1999). Even Machiavelli accords property some special importance; though he made the point in a slightly different manner saying, "[b]ut above all, [the Prince] must abstain from the property of others, because men forget the death of a father more quickly than the loss of a patrimony." NICCOLO MACHIAVELLI, *THE PRINCE* 67 (Harvey C. Mansfield trans., 2d ed. 1998) (1513).

167. On first blush, of course, it appears the parties have equal burdens. However, that is far from the truth. It is significantly easier for the government to prove it is more likely than not that

not be left to negate a set of facts like those the House Judiciary Committee described:

The Committee has heard testimony from the executor of an estate who was placed, along with the beneficiaries of a house, in the position of having to fight a seizure based on "an unnamed person in prison (having) told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of the decedent . . . on an unspecified date in December 1988."¹⁶⁸

Raising the government's burden of proof would prevent a significant number of individuals from being forced to meet this heightened burden or face losing property.

The final prong also weighs in favor of raising the burden of proof. The government has a significant interest in combating criminal narcotics activity in an efficient and effective manner. Civil forfeiture of property used to facilitate these crimes and property that is the proceeds of these crimes is an effective way to combat criminal drug activity. However, this method is effective only insofar as it is not overbroad and does not strike at the truly innocent. If innocent persons are swept into these proceedings, the government's interest in effective law enforcement is actually retarded. Those individuals who would otherwise assist law enforcement to discover and root out drug activity will be unwilling to become involved for fear of losing their property for having even a passing association with the criminal activity. Under these circumstances, as Justice Thomas noted, "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."¹⁶⁹

Raising the burden of proof combats this problem in two ways. First, by raising the government's burden of proof going forward, one ensures from the start that we are substantially more certain that the property is actually subject to forfeiture before forcing an allegedly innocent party to prove the property is not subject to forfeiture. After the government has shown by at least clear and convincing evidence that the property is subject to civil forfeiture, it makes sense to force the party claiming innocence to meet the burden by a preponderance of the evidence. Second, forfeiture has long been recognized as a quasi-criminal proceeding. Thus, the U.S. Supreme Court held civil forfeiture is "quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law."¹⁷⁰ Though proof beyond a reasonable

the property was in some way used to facilitate a narcotics crime, or is the proceeds of a narcotics crime, than it is for the owner to prove the property was *never* used to facilitate a narcotics crime and is not, in any way, the proceeds of a narcotics crime.

168. H.R. REP. NO. 106-192 at n.67 (1999).

169. *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

170. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (citing *Boyd v. United States*, 116 U.S. 616, 634 (1886)).

doubt may not be appropriate for these proceedings; a standard such as clear and convincing evidence certainly fits. Given the quasi-criminal and punitive nature of a civil forfeiture proceeding, the government should be forced to meet a higher burden than a mere preponderance of the evidence. To decide otherwise would simply not reflect the value our society places on private property and invites heavy-handed government actions.

Recognizing the importance of property rights in the United States and the quasi-criminal nature of forfeiture actions, even the House Judiciary Committee Report acknowledged that something higher than preponderance of the evidence is necessary. "The general civil standard of proof[,] preponderance of the evidence[,] is too low a standard to assign to the government in this type of case. A higher standard of proof is needed that recognizes that in reality the government is alleging that a crime has taken place."¹⁷¹ The Committee thus recognized that the nature of a civil forfeiture proceeding meant that a preponderance standard is simply inequitable. It also provided a reason for not seeking the criminal standard of beyond a reasonable doubt. The Committee noted that "[s]ince civil forfeiture doesn't threaten imprisonment, proof beyond a reasonable doubt is not necessary. The intermediate standard, clear and convincing evidence, is more appropriate."¹⁷² This accords with a sizeable number of states that require proof beyond a preponderance of the evidence.

The Florida, Louisiana, and Nevada Supreme Courts¹⁷³ have all held, based on these or similar concerns, that more than a mere preponderance of evidence is necessary. Thus, in *Department of Law Enforcement v. Real Property*, the Florida Supreme Court noted that, "'due proof' under the Act constitutionally means that the government may not take an individual's property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property being forfeited was used in the commission of a crime."¹⁷⁴ Further, California, New York, and Wisconsin all provide for higher burdens of proof by statute. For instance, New York requires that "if the action is not grounded upon [a] conviction, it shall be necessary in the action for the claiming authority to prove the commission of a pre-conviction forfeiture crime by clear and convincing evidence."¹⁷⁵ It thus becomes difficult to argue that such a standard

171. H.R. REP. NO. 106-192, at 12 (1999).

172. *Id.* at 13 (footnote omitted).

173. *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991); *State v. Manuel*, 426 So. 2d 140, 148 (La. 1983) ("At trial of the forfeiture proceeding, of course, the state must prove each element of its case beyond a reasonable doubt because forfeiture proceedings are quasi-criminal."); *A 1983 Volkswagen v. County of Washoe*, 699 P.2d 108, 109 (Nev. 1985) (recognizing the quasi-criminal nature of forfeiture actions stating "[p]roof beyond a reasonable doubt is therefore appropriate in order that the innocent not be permanently deprived of their property.").

174. 588 So. 2d at 968.

175. N.Y. C.P.L.R. § 1311(1)(b) (2000) (subsection (3)(b)(i) also provides, with some exceptions, that in actions against a non-criminal defendant the "claiming authority" must meet a clear and convincing burden of proof). *Accord* CAL. HEALTH & SAFETY CODE § 11488.4(i)(1)

is unworkable or unduly burdensome.

In sum, there are four major reasons that support a higher burden of proof. First, the value placed on private property in America and throughout American history requires that the government bear the heavier burden when seizing property in civil forfeiture cases. Under the present system, because the property owner must negate the government's case, he or she has a heavier burden. Second, the due process concerns reflected in the *Matthews v. Eldridge* test¹⁷⁶ point to an unacceptable risk that innocent parties will be erroneously deprived of their property. Raising the government's burden of proof will reduce this danger. Third, the quasi-criminal nature of civil forfeiture demands that the government be forced to prove the property is subject to forfeiture by something more than a mere preponderance of the evidence. Finally, the fact that a number of states, either judicially or via statute, have adopted a higher standard suggests this is a workable standard that protects individual rights and helps fight crime.

D. The Innocent Owner Provision

Another important part of the Reform Act concerns the changes it makes to the innocent owner provisions. The Reform Act replaces the separate "innocent owner" provisions of §§ 881(a)(4), (6) and (7) with one innocent owner provision that applies to all federal civil forfeitures. The Act does not, however, specifically identify which pre-Reform Act test should be used (disjunctive, disjunctive with negligence standard, or conjunctive reading). However, a close look at the Act's language readily yields an answer. As it now reads, the Reform Act provides,

the term "innocent owner" means an owner who—

(i) did not know of the conduct giving rise to forfeiture; or
(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(iii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical

(2000) (reasonable doubt); WIS. STAT. § 973.076(3) (2000).

176. 424 U.S. 319, 335 (1976).

danger.¹⁷⁷

The plain language of the Reform Act suggests that it adopts what was the "knowledge or consent" (disjunctive) reading of § 881(a)(7) and other statutes. The Act also plainly adopts the negligence standard used by several courts prior to the passage of the Reform Act. Although subparagraph (A) refers only to actual knowledge and a negligence standard and makes no mention of consent, subparagraph (B)(II) refers to revoking consent for the offender's use of the property. The Act thus rejects the position that some courts have taken with regard to conveyances and other chattels, that the use of the property for activity leading to forfeiture must be illegal (i.e., the car must have been stolen or taken without permission). One cannot simply argue, as Bennis did, that she did not know her husband would use the car to engage in sexual activity with a prostitute.¹⁷⁸ A plain meaning reading of the Reform Act seems to reject that position.

That the "knowledge or consent" test with a negligence standard was the one Congress intended to enact is supported by two other points. First, the Judiciary Committee Report on the Reform Act notes that the bill rejects the conjunctive reading, saying, "the [innocent owner] protections of the [sections] using the 'committed or omitted' language have been seriously eroded by a number of federal courts ruling that qualifying owners must have had no knowledge of and provided no consent to the prohibited use of the property."¹⁷⁹ Further, the Committee specifically said that the purpose of this innocent owner defense was to provide "a meaningful innocent owner defense [which] is required by fundamental fairness."¹⁸⁰ Thus, under the Civil Asset Forfeiture Reform Act, an innocent owner can now avoid forfeiture by proving either lack of knowledge or lack of consent so long as he or she was not negligent in discovering the illegal use of his or her property.

The Reform Act also makes an attempt to solve the post-illegal act transferee problem. The post-illegal act transferee problem arose based on a disjunctive reading of the innocent owner provisions as informed by the U.S. Supreme Court's opinion in *92 Buena Vista Ave.*¹⁸¹ There the Court held that the innocent owner defense is not limited to bona fide purchasers and that the innocent owner provisions are not nullified by the relation-back doctrine.¹⁸² Thus, when the

177. 18 U.S.C. § 983(d)(2) (2000).

178. *Bennis v. Michigan*, 516 U.S. 442 (1996).

179. H.R. REP. NO. 106-192, at 15 (1999).

180. *Id.*

181. 507 U.S. 111 (1993). The post-illegal act transferee problem is perhaps best demonstrated in *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994). In *One 1973 Rolls Royce*, the Third Circuit held that the transferee's knowledge about whether the property was used to facilitate a drug crime is evaluated at the time of the crime and not at the time of the transfer. Thus, criminals could transfer a wide range of property even if the transferee knew, at the time of the transfer, that the property was used to facilitate a crime.

182. *92 Buena Vista Ave.*, 507 U.S. at 126-27 (the relation-back doctrine would vest title in

innocent owner provision is read disjunctively, someone to whom property is transferred after the offending acts would be able, in most cases, to claim he or she did not consent to the illegal acts. A bad actor would then be able to insulate many properties by simply transferring property to third parties after the offending acts. A major problem, to be sure.

The Reform Act attempted to solve this problem by defining after-conduct innocent owners narrowly. Thus, the only individuals who qualify as after-conduct innocent owners are those considered to be bona fide purchasers for value and those who were reasonably without cause to believe that the property was subject to forfeiture.¹⁸³ Congress, as expressed in the House Judiciary Committee report, sought to make two exceptions to this narrow definition: where the owner acquired the interest through probate or inheritance and, at the time of acquisition, was reasonably without cause to believe that the property was subject to forfeiture, and where the owner is the spouse or minor child and the property is used as a primary residence, but the spouse or minor child must have been reasonably without cause to believe that the property was subject to forfeiture at the time the interest was acquired.¹⁸⁴

The final, duly enacted version of the Reform Act, in an effort to make these intentions a reality, therefore provides:

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term “innocent owner” means a person who, at the time that person acquired the interest in the property—

- (i) was a bona fide purchaser or seller for value . . . and
- (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if —

- (i) the property is the primary residence of the claimant;
- (ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;
- (iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and
- (iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the

the government on the occurrence of the illegal acts subjecting the property to the forfeiture—thereby making it impossible to transfer the property even to a bona fide purchaser for value without notice).

183. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 202, 206 (2000) (codified as amended at 18 U.S.C. § 983(d)(3)(A) (2000)).

184. H.R. REP. NO. 106-192, at 16 (2000).

spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate . . .¹⁸⁵

These changes, embodied in the newly enacted § 983(d)(3), go too far because subsection (3)(B) will be interpreted as a list of elements that require that the property not be, and not be “traceable to, the proceeds of any criminal offense.”¹⁸⁶ In fact, the Ninth Circuit has already interpreted this provision in such a manner. In *United States v. Hooper*,¹⁸⁷ the claimants were the spouses of two men who pled guilty to federal narcotics offenses. The spouses alleged that they innocently acquired community property rights in certain assets that were to be forfeited to the federal government because the assets were admittedly used to facilitate narcotics activity or were the proceeds of that activity; the property included vehicles, cash, and a business.¹⁸⁸ The Ninth Circuit noted that, even if it applied,¹⁸⁹ the newly enacted Reform Act would not save the spouses’ property because the primary residence could be retained only if it was “not, and is not traceable to, the proceeds of any criminal offense.”¹⁹⁰

This innocent owner defense was supposed to allow heirs, spouses, and minor children who “were reasonably without cause to believe that the property was subject to forfeiture”¹⁹¹ to redeem property whether or not the property was the proceeds of any criminal offense or is traceable to the proceeds of any criminal offense. However, by writing the statute as it did, Congress made it impossible to protect precisely the three types of transferees (heirs, spouses, and minor children) it originally expressed an interest in protecting. Subsection (B)

185. 18 U.S.C. § 983(d)(3) (2002). Subsection 983(d)(3) suffers from a number of problems. This subsection makes an effort to solve the post-illegal act transferee problem, but likely goes too far. These problems become clear when one imagines a scenario where a court attempts to decide whether property is subject to forfeiture when the former spouse’s property (a car, house, and retirement funds) are the proceeds of criminal activities but were awarded to him or her in divorce proceedings.

186. *Id.* at § 983(d)(3)(B)(iii).

187. 229 F.3d 818 (9th Cir. 2000).

188. *Id.*

189. The Civil Asset Forfeiture Reform Act did not apply because this civil forfeiture case began before the Act became effective in August 2000.

190. *Hooper*, 229 F.3d at 223. See Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 KY. L.J. 653, 703 (2001) (Cassella, the Assistant Chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice and principal drafter of the Department of Justice’s asset forfeiture proposals, notes that the government objected to any exception for heirs and spouses and that the final provision was a compromise that forces the claimant to prove each element).

191. The whole point, after all, of establishing an innocent owner defense is that the property is not subject to forfeiture even if it was involved in the offense or was the proceeds of a criminal offense.

works to remove the protection since the language plainly reads as a list of elements, one of which requires that “the property is not, and is not traceable to, the proceeds of any criminal offense.”¹⁹² Thus, under the newly enacted § 983(d)(3), heirs, spouses, and minor children essentially have protection from forfeiture only when the government made a mistake and the property really was not the proceeds of, or traceable to, a criminal offense, in which case, there is little point to providing the defense since the property would not be subject to forfeiture at all. Section 983(d)(3)(B)(iii) therefore nullifies the protections subsection (B) sought to add and makes them meaningless. The vast majority of the problems could, however, be solved by deleting § 983(d)(3)(B)(iii) and inserting “who was reasonably without cause to believe that the property was subject to forfeiture at the time he or she acquired his or her interest” after “claimant” in § 983(d)(3)(B).

With this correction to the statutory language, those innocent owners (heirs, spouses, and minor children) originally destined for protection under the Reform Act would receive that protection. According these persons protection from civil forfeiture helps to make the forfeiture laws more precise and keeps the laws from being overbroad. With regard to heirs, there is little danger of heirs being involved since the statute already provides that these individuals cannot keep the property if they knew or could have known the property was subject to forfeiture. Human nature and logic also protect the government’s interest because, as the Judiciary Committee pointed out, there is relatively little danger of criminals committing suicide in order to protect property or other ill-gotten gains.¹⁹³ With regard to spouses and minor children, the statute protects against their involvement since they cannot protect property if they knew or reasonably should have known the property was subject to forfeiture. To remove these protections and permit the government to take the homes in which spouses and minor children live would do relatively little to further the government’s efforts to combat criminal drug activity¹⁹⁴ and it would, as the Supreme Court noted in *Calero-Toledo*, “be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.”¹⁹⁵

CONCLUSION

This Note has examined this nation’s civil forfeiture laws prior to the Civil

192. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 202, 206 (2000) (codified as amended at 18 U.S.C. § 983(a)(3)(B)(iii) (2000)).

193. H.R. REP. NO. 106-192, at 16 (1999). *But see* *United States v. 221 Dana Ave.*, 261 F.3d 65 (1st Cir. 2001). In *221 Dana Ave.*, the husband committed suicide shortly after being arrested and drafting a will that left to his wife the property he had been using to distribute narcotics. The parties admitted that the wife learned of these activities only after her husband was arrested. Nevertheless, the point remains that once the wrongdoer commits suicide she is unable to enjoy the fruits of the criminal activity and little is gained by punishing the innocent family members.

194. 416 U.S. 663 (1974).

195. *Id.* at 690.

Asset Forfeiture Reform Act and has examined the reforms made by the Act. The Reform Act makes a number of important changes by providing greater procedural norms, representation for indigent property owners, and a common and clarified innocent owner defense for all civil forfeiture cases. Ultimately, however, the Reform Act fails to fully solve three problems presently inherent in the civil forfeiture laws.

First, the Act fails to completely equalize the burdens of proof required by the government and innocent owners. Although the government's burden of proof has been raised, the fact that the property owner is required to completely negate the government's allegations means that he or she must, in reality, meet a much higher standard. Therefore, the government's burden of proof should, as the House Judiciary Committee noted, be raised to the clear and convincing standard. This standard not only redresses the inequities inherent in the current burdens of proof but also takes into account the fact that civil forfeiture is a quasi-criminal action in which the government is essentially alleging a crime was committed. The government should be held to a high burden of proof.

Next, the Reform Act fails to adopt the proper inquiry under the Excessive Fines Clause and instead only uses a proportionality inquiry. In civil forfeiture proceedings under § 881(a), proportionality is not enough because the proceedings are not merely punitive; they are also remedial and preventative. Where forfeitures are explicitly aimed at the instrumentalities of the crime in an effort to prevent future crimes, and where the forfeiture is aimed at the instrumentalities or proceeds of the crime in an effort to remedy the wrongs, an instrumentality inquiry is necessary. In such a case, a forfeiture could be excessive either because it is grossly disproportionate, or because there is little or no nexus between the offense and the property—a two-pronged inquiry is therefore necessary.

Finally, in an effort to solve the post-illegal act transferee problem, the act makes it impossible for heirs, spouses, and minor children to protect their property. As written, the act makes the defenses intended to help heirs, spouses, and minor children pointless. These provisions should be rewritten to put into place the defenses that would protect this group of post-illegal act transferees. Taking property from this group does relatively little to further the "war on drugs" and is "unduly oppressive."

THE EMERGENCE OF DIVERGENCE: THE FEDERAL COURT'S STRUGGLE TO APPLY *HECK V. HUMPHREY* TO § 1983 CLAIMS FOR ILLEGAL SEARCHES

PAUL D. VINK*

INTRODUCTION

Section 1983¹ claims arising from an alleged illegal search or seizure of property have afforded scores of convicted criminals the opportunity to attack their convictions collaterally through a civil suit for damages. Meanwhile, other criminals, despite equally meritorious § 1983 illegal search claims, have found the federal courthouse doors in their jurisdictions closed. The federal courts have failed to consistently apply federal law in an area where litigation is commonplace, as evidenced by the U.S. Supreme Court's recent remark that § 1983 claims are one of the "most fertile sources of federal-court prisoner litigation."²

In light of the frequency of § 1983 claims for an alleged unreasonable search or seizure of property, the question that has divided the United States Circuit Courts of Appeals is the following: can a person pursue a § 1983 claim arising from an alleged illegal search and seizure while the criminal case is still pending or before the criminal conviction has been invalidated or reversed in some way? Stated another way, is a § 1983 claimant unequivocally barred from bringing a civil suit for damages arising from an alleged unreasonable search before the criminal proceeding has been resolved in such a way that demonstrates the invalidity of the search? This issue has yielded a federal circuit court split³ and is the subject of this Note.

Neither the text of § 1983 nor the statutory history is particularly helpful in resolving the technical enigma of when a civil suit is proper in light of a previous conviction. Section 1983 reads in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

* J.D. Candidate, 2002, Indiana University School of Law—Indianapolis; B.A., 1998, Northwestern College, Orange City, Iowa.

1. "Section 1983" is widely used by lawyers and throughout this Note as shorthand for the civil rights statute codified as 42 U.S.C. § 1983 (Supp. V 1999). *See infra* text accompanying notes 4-6.

2. *Heck v. Humphrey*, 512 U.S. 477, 480 (1994).

3. *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (noting the Second and Sixth Circuits disagree with the Seventh, Eighth, Tenth, and Eleventh Circuits regarding the propriety of bringing a § 1983 claim for an alleged illegal search before the original conviction has been invalidated); *Salts v. Moore*, 107 F. Supp. 2d 732, 737 (N.D. Miss. 2000) (referencing the current circuit split), *appeal dismissed by* 250 F. 3d 741 (5th Cir. 2001).

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress⁴

Section 1983 was originally drafted as part of the Civil Rights Act of 1871, in the wake of the Civil War, in an effort by Congress to provide a civil remedy for minorities and their supporters who were victimized by state actors under the control of the Ku Klux Klan.⁵ Section 1983 created a means for all United States citizens, irrespective of race, to recover damages if claimant can prove that a state actor violated her constitutional rights by failing or refusing to enforce state law.⁶

This Note will explain and analyze the two divergent schools of thought that have polarized the federal circuit courts. Part I will introduce the reader to *Heck v. Humphrey*,⁷ a 1994 Supreme Court case that set out to resolve when § 1983 claims can be appropriately brought, but ironically spawned the current circuit split. Part II of the Note will discuss in detail the case law that represents the current dichotomy among the federal courts. Part III will turn to a comparative analysis of the two positions, including the strengths and weaknesses of each. Part IV of the Note will offer the writer's opinion as to which circuit position is preferable and which circuit position more accurately adheres to the language of *Heck v. Humphrey*. Finally, the conclusion will provide some final thoughts regarding the need for resolution of the current circuit split to restore the consistent and uniform application of federal law to § 1983 illegal search claims.

The discussion in this Note regarding § 1983 claims is confined to civil actions for damages arising from an alleged illegal search or seizure of *property*. This Note is not intended to provide an analysis of other § 1983 claims, including claims for malicious prosecution, false arrest, excessive force, etc. Federal cases regarding these § 1983 actions have been included only if they shed some light on a circuit's position pertaining to illegal search claims.

It is imperative to understand from the outset the factual circumstances that precipitate a § 1983 claim for an alleged illegal search. The following hypothetical example is illustrative of the typical fact pattern. Jerry is a suspected drug dealer who is stopped and frisked by the police on a street corner after the police receive a tip that Jerry is selling drugs. The police search of Jerry yields fifteen grams of cocaine and an illegal firearm in his coat pocket that is subsequently seized. At the criminal hearing following Jerry's arrest, Jerry seeks to have the drugs and handgun suppressed on the grounds that the police conducted an illegal search and seizure. However, the trial court judge rules the evidence admissible and Jerry is convicted of possession both of narcotics and an illegal handgun. Following Jerry's conviction, which resulted largely from the

4. 42 U.S.C. § 1983.

5. See Eric J. Savoy, *Heck v. Humphrey: What Should State Prisoners Use When Seeking Damages from State Officials . . . Section 1983 or Federal Habeas Corpus?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 109, 111 (1996).

6. *Id.* 111-12.

7. 512 U.S. 477 (1994).

determination that the drugs and handgun were admissible evidence, Jerry brings a civil action for damages pursuant to § 1983, alleging that the police officers violated his Fourth Amendment constitutional right to be free from unreasonable searches and seizures.

Under the current status of the law, Jerry's ability to go forward with his civil claim for damages is contingent on the federal court in which Jerry brings the claim. In the Seventh, Eighth, Tenth, and Eleventh Circuits Jerry would likely be able to proceed with his civil claim for damages under § 1983 notwithstanding the facts that the criminal court ruled the evidence was admissible and that Jerry's conviction has not been overturned.⁸ Conversely, the Second, Fifth, Sixth, and Ninth Circuits would likely bar the claim from proceeding unless and until the criminal convictions (or admissibility of the drugs and handgun) had been reversed.⁹ The respective circuit court positions will be discussed in significantly greater detail in Part II of this Note.

I. THE ORIGIN OF THE DEBATE: *HECK V. HUMPHREY*

The Supreme Court, in its 1994 decision *Heck v. Humphrey*,¹⁰ dealt extensively with a criminal's ability to bring a § 1983 claim prior to the reversal of the criminal conviction. In *Heck*, the petitioner Roy Heck was convicted and sentenced to fifteen years of incarceration for voluntary manslaughter of his wife.¹¹ While Heck's appeal from his criminal conviction was pending, he filed a § 1983 suit for damages that alleged the county prosecutors and a police investigator conducted an "arbitrary investigation" that included the illegal destruction of evidence that "was exculpatory in nature and could have proved [petitioner's] innocence."¹² Both the federal district court and the Seventh Circuit Court of Appeals dismissed Heck's § 1983 complaint because the suit was perceived as a collateral challenge in a civil proceeding to the legality of Heck's criminal conviction.¹³ Following the Supreme Court's grant of certiorari,

8. See *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553 (10th Cir. 1999); *Copus v. City of Edgerton*, 151 F.3d 646 (7th Cir. 1998); *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996); *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995) (per curiam).

9. See *Harvey v. Waldron*, 210 F.3d 1008 (9th Cir. 2000); *Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995); *Mackey v. Dickson*, 47 F.3d 744 (5th Cir. 1995) (per curiam); *Woods v. Candela*, 47 F.3d 545 (2d Cir. 1995) (per curiam).

10. 512 U.S. 477 (1994).

11. *Id.* at 478.

12. *Id.* at 479 (internal quotation marks omitted) (alteration by court).

13. See *id.* at 479-80. The Seventh Circuit affirmed the district court's dismissal of the § 1983 claim, stating:

If, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.

Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993), cert. granted, 510 U.S. 1068 (1994), *aff'd*

the Court was equally as clear as the Seventh Circuit had been in its condemnation of the use of a civil suit to collaterally attack a criminal conviction.¹⁴ The Court held in unequivocal terms that

in order to recover damages for allegedly unconstitutional conviction or imprisonment . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.¹⁵

The Court, however, left the decision to the district court to determine if the plaintiff's § 1983 claim would impugn the validity of the previous criminal conviction:

[T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed¹⁶

The holding of *Heck* seemed straightforward: a § 1983 claim cannot be pursued prior to a favorable termination of the conviction if a trial court judge determined it would imply the invalidity of the criminal conviction.¹⁷ However, the Supreme Court went beyond the unambiguous holding to point out that not all § 1983 claims are subject to the favorable termination requirement. In footnote seven of the opinion, the Court cited an example of a § 1983 claim that could go forward because the claim did not "necessarily imply the invalidity" of the criminal conviction:

[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was

512 U.S. 477 (1994).

14. See *Heck*, 512 U.S. at 484-87.

15. *Id.* at 486-87 (footnote and citation omitted). The requirement that a conviction or sentence must be shown to have been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus," *id.* at 487, has been appropriately labeled by Justice Souter as the "favorable termination" requirement and will be referred to as such throughout this Note. See *id.* at 492 (Souter, J., concurring).

16. *Id.* at 487.

17. See *id.*

introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery . . . such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.¹⁸

Footnote seven of the *Heck* opinion is responsible for the current rift in the circuit courts.¹⁹ The Seventh, Eighth, Tenth, and Eleventh Circuits have taken the position that "footnote seven creates a general exception" for § 1983 illegal search and seizure claims to the general rule articulated in *Heck* that § 1983 claims are barred if the trial court determines it is a collateral attack on the criminal conviction.²⁰ Whereas other § 1983 causes of action like excessive force or malicious prosecution are prohibited under *Heck*, absent a showing the claim will not impugn the validity of the criminal conviction, a § 1983 claim for an alleged illegal search can go forward regardless of the status of the criminal conviction because it will not necessarily imply its invalidity.

While the Seventh, Eighth, Tenth, and Eleventh Circuits read footnote seven as a blanket *exception*, the Second, Fifth, Sixth, and Ninth Circuits read footnote seven as merely an *example* of a § 1983 claim that would be allowed to proceed within the framework of the analysis set forth in *Heck*.²¹ To the latter circuit courts, footnote seven does not alter the usual *Heck* requirements that determine whether a § 1983 claim for an alleged illegal search and seizure can proceed.²² A claim for an alleged illegal search, like any other § 1983 action, must show that it does not undermine the validity of the prior criminal conviction or the claimant will be prohibited from bringing the claim.²³ Thus, footnote seven, according to the Second, Fifth, Sixth, and Ninth Circuit Courts, is merely illustrative of a § 1983 claim that could go forward despite the fact that the criminal conviction has not been reversed or invalidated in any way.²⁴

18. *Id.* at 487 n.7.

19. *Salts v. Moore*, 107 F. Supp. 2d 732, 737 (N.D. Miss. 2000) (noting the current circuit split regarding the interpretation of footnote seven of the *Heck* opinion), *appeal dismissed by* 250 F.3d 741 (5th Cir. 2001).

20. *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000); *see also Beck v. City of Muskogee Police Dep't*, 195 F.3d 553 (10th Cir. 1999); *Copus v. City of Edgerton*, 151 F.3d 646 (7th Cir. 1998); *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996); *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995) (*per curiam*).

21. *See Harvey*, 210 F.3d at 1015; *accord Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995); *Mackey v. Dickson*, 47 F.3d 744 (5th Cir. 1995) (*per curiam*); *Woods v. Candela*, 47 F.3d 545 (2d Cir. 1995) (*per curiam*).

22. *See Harvey*, 210 F.3d at 1015.

23. *See id.*

24. For the sake of reading ease and simplicity, the Seventh, Eighth, Tenth, and Eleventh Circuits' position will be referred to as the "Exception position" for the duration of the Note. The Second, Fifth, Sixth, and Ninth Circuits' position will be labeled the "Example position."

II. POST-HECK ANALYSIS AND RULINGS IN THE FEDERAL COURTS

As the foregoing suggests, the federal circuit courts disagree as to the proper application of the *Heck* holding to § 1983 claims for illegal searches and seizures. Although most of the federal circuit courts have used language indicative of a tendency to vacillate between the two poles of § 1983 jurisprudence, two different points of view have emerged among the circuit courts, which are labeled herein the Exception and Example positions respectively.²⁵ The respective positions of the individual circuit courts within the Exception and Example positions will now be outlined in detail.²⁶

A. *Exception Position Held by the Seventh, Eighth, Tenth, and Eleventh Circuits*

The Seventh Circuit, through extensive analysis of *Heck*'s impact on § 1983 illegal search claims, has championed the Exception position more vigorously than any of the other circuit courts. The leading Seventh Circuit case of *Copus v. City of Edgerton*²⁷ is indicative of the circuit's belief that footnote seven of the *Heck* opinion created a blanket exception for § 1983 illegal search and seizure claims from the favorable termination requirement.²⁸ In *Copus*, the plaintiff had been convicted of possession of various illegal weapons after the police searched his home without a warrant in response to a domestic dispute.²⁹ While serving time for his weapons offenses and without reversal of his criminal conviction, Copus filed a § 1983 claim for damages arising from the alleged illegal search

25. The federal D.C., First, Third, and Fourth Circuits' positions are absent from the following discussion because these circuits have not extensively discussed the applicability of *Heck v. Humphrey* to § 1983 illegal search claims. However, both the First and Fourth Circuits, while primarily deciding § 1983 litigation for claims other than for an illegal search, have intimated that they lean toward the Example position held by the Second, Fifth, Sixth, and Ninth Circuits. See *Scott v. Wellesley Police Dep't*, No. 98-1280, 1998 WL 1085778, at *1 (1st Cir. Sept. 24, 1998) (per curiam) (stating, with respect to several § 1983 illegal search claims, that "to the extent they are not barred under *Heck v. Humphrey*, plaintiff's claims each fail on the merits") (citation omitted); *Brooks v. City of Winston-Salem*, No. 95-6546, 1996 WL 531299, at *2 (4th Cir. Aug. 15, 1996) (per curiam) (recognizing, without expressly including illegal search claims, that § 1983 claims under *Heck* generally require a favorable termination of the criminal conviction before proceeding); *Wright v. Oliver*, 85 F.3d 178, 182-83 (4th Cir. 1996) (holding that the § 1983 claim for an alleged warrantless arrest could have proceeded immediately without affecting the validity of the conviction); *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995) (holding that the plaintiff's § 1983 claims did not accrue until the criminal trial ended in acquittal); *Snyder v. City of Alexandria*, 870 F. Supp. 672, 685-88 (E.D. Va. 1994) (discussing *Heck* and applying the Example position by analyzing each of plaintiff's § 1983 claims and determining which, if any, of the claims necessarily implied the invalidity of the plaintiff's conviction).

26. Because of the substantial quantity of § 1983 claims brought in the federal courts, the following cases are intended to be illustrative of each circuit's position rather than exhaustive.

27. 151 F.3d 646 (7th Cir. 1998).

28. See *id.* at 648-49.

29. *Id.* at 647.

of his home and subsequent seizure of his weapons.³⁰ Following the dismissal by the district court of Copus's claim under *Heck*, the Seventh Circuit agreed to hear Copus's appeal and decide "whether the district court correctly concluded that a judgment in favor of Copus in his civil suit alleging an unlawful search and seizure under the Fourth Amendment necessarily would imply the invalidity of his confinement."³¹ The Seventh Circuit reversed the district court by concluding that "*Heck* does not bar a claim such as Copus" because "Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so *in all cases* these claims can go forward."³²

The Seventh Circuit's rationale for the *Copus* holding was simply that "a search can be unlawful but the conviction entirely proper, or the reverse," and thus that a search, even if it produces admissible evidence used to convict, is not necessarily legal.³³ Because it was *possible* that Copus's conviction could be valid while the search that produced the damning evidence was conducted illegally, *Heck* did not mandate the dismissal of Copus's claim because success on his Section 1983 claim did not "necessarily . . . impugn the validity of his conviction."³⁴

Other Seventh Circuit decisions have consistently held that a § 1983 claim for an alleged illegal search is not barred by *Heck*'s favorable termination requirement. In *Perez v. Sifel*,³⁵ the plaintiff was incarcerated at a correctional facility when he filed a § 1983 claim against several police officers alleging, among several civil rights violations, that an illegal search was conducted.³⁶ The court held that "[t]he claims relating to an illegal search and an improper arrest may not be barred [by *Heck*], as neither claim would *necessarily* undermine the validity of the conviction."³⁷ Similarly, in the 1995 case *Simpson v. Rowan*,³⁸ the

30. *Id.*

31. *Id.* at 647-48.

32. *Id.* (emphasis added).

33. *Id.* at 649 (quoting *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998)).

34. *Id.*

35. 57 F.3d 503 (7th Cir. 1995) (per curiam).

36. *Id.* at 504-05.

37. *Id.* at 505. Despite this holding, however, the Seventh Circuit remanded the case to the trial court to determine if the illegal search claim would in fact impugn the validity of the conviction. *Id.* This minor aberration from the Exception position, which the Seventh Circuit has generally championed, was irrefutably corrected by the *Copus* holding that "in all cases these [§ 1983 claims for an illegal search] can go forward." 151 F.3d at 648; *see also* *McClain v. U.S. Dep't of Justice*, 17 Fed. Appx. 471, 473-74 (7th Cir. 2001) (noting "it is well-settled that Fourth Amendment claims of wrongful search . . . may succeed without undermining a conviction and thus are not implicated by *Heck*"); *Blanck v. Hobson*, No. 98-2993, 2000 WL 637544, at *3 (7th Cir. May 16, 2000) (stating that "a damages action for an illegal search would not necessarily imply the invalidity of a conviction"); *Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998) ("The fact that some evidence used in a trial is tainted by illegality does not necessarily undermine the conviction . . .").

38. 73 F.3d 134 (7th Cir. 1995).

plaintiff, who was convicted for felony murder and sentenced to death, brought a § 1983 claim for damages alleging an illegal search and arrest.³⁹ In response to the district court's dismissal of the case, the Seventh Circuit reiterated that "Simpson's claims relating to an illegal search . . . are not barred by *Heck*" because "a conviction generally need not be set aside in order for a plaintiff to pursue a § 1983 claim under the Fourth Amendment."⁴⁰

Like the Seventh Circuit, the Eighth Circuit has construed *Heck*'s footnote seven as providing a general exception for § 1983 illegal search and seizure claims. In *Simmons v. O'Brien*,⁴¹ a plaintiff brought a § 1983 claim following his state conviction for second-degree murder and first-degree burglary.⁴² The § 1983 claim asserted an alleged coerced confession rather than an illegal search.⁴³ Nevertheless, the court found the Fifth Amendment claim tantamount to the illegal search exception established in *Heck* and thus the claim could be brought prior to the reversal of the plaintiff's conviction.⁴⁴

The Eighth Circuit again indicated its affiliation with the Exception position in *Moore v. Sims*.⁴⁵ The plaintiff in *Moore* had been convicted of possession of a controlled substance when he sought relief pursuant to § 1983 for an alleged illegal seizure.⁴⁶ Immediately after quoting footnote seven from the *Heck* opinion, the court found that Moore's claim could proceed without violating *Heck*: "If Moore successfully demonstrates that his initial seizure and detention by officers was without probable cause, such a result does not necessarily imply the invalidity of his drug-possession conviction. We therefore reverse the dismissal of this claim."⁴⁷ Although both *Simmons* and *Moore* involved § 1983 claims for alleged constitutional violations other than an illegal search, both cases expressly used *Heck*'s reference to illegal search claims as a springboard for their rationale that the § 1983 claims before the court were not barred by *Heck*.⁴⁸ Consequently, it is a safe assumption that the Eighth Circuit has adopted the Exception position for § 1983 illegal search claims and will expressly do so when given the opportunity.⁴⁹

39. *Id.* at 135.

40. *Id.* at 136.

41. 77 F.3d 1093 (8th Cir. 1996).

42. *Id.* at 1094.

43. *Id.*

44. *See id.* at 1095 (stating that "in terms of effect on trial, there was no qualitative distinction between the admission at trial of illegally seized evidence and the admission of involuntary confessions").

45. 200 F.3d 1170 (8th Cir. 2000) (per curiam).

46. *Id.* at 1170-71.

47. *Id.* at 1171-72.

48. *See id.*; *Simmons*, 77 F.3d at 1095.

49. *See Whitmore v. Harrington*, 204 F.3d 784, 784-85 (8th Cir. 2000) (per curiam) (holding, in a *Bivens* action brought against federal agents for an alleged unlawful stop that, "[i]f Whitmore were to succeed on this claim, it would not necessarily imply the invalidity of his later drug convictions."); *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (stating that the Eighth

Like the Seventh Circuit, the Tenth Circuit has clearly embraced the Exception position by holding that § 1983 claims for an illegal search can proceed absent a favorable termination of the prior conviction. In *Beck v. City of Muskogee Police Dep't*,⁵⁰ an incarcerated plaintiff brought several § 1983 claims against the Muskogee Police Department, including a claim for an unreasonable search.⁵¹ The court held that while many of the § 1983 claims were premature because *Heck*'s favorable termination requirement had not been met, the claim for an illegal search was different because "*Heck* applies only to those claims that would necessarily imply the invalidity of any conviction."⁵² Likewise, in *Cotner v. Fugate*,⁵³ the court ruled that the plaintiff's § 1983 claims for illegal search and seizures could be brought notwithstanding the fact that Cotner's conviction had not been reversed: "[W]e agree with Cotner that his claims, if proved, would not necessarily demonstrate the invalidity of his convictions and sentence"⁵⁴

The Eleventh Circuit was the final circuit to adopt the Exception position. In *Datz v. Kilgore*,⁵⁵ a plaintiff, Datz, was convicted for possessing a firearm as a felon after the police conducted a search of Datz' car and found a rifle.⁵⁶ In response to Datz' § 1983 claim for damages stemming from the alleged illegal search, the court stated, "*Heck v. Humphrey* is no bar to Datz' civil action because, even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid"⁵⁷

The Eleventh Circuit in *Datz*, like the Seventh, Eighth, and Tenth Circuits, appears to hold that because a § 1983 claim for an illegal search will not

Circuit, among others, has "held that footnote seven creates a general exception to *Heck* for § 1983 Fourth Amendment unreasonable search and seizure claims"). *But see* *Rice v. Barnes*, 966 F. Supp. 890, 897 (W.D. Mo. 1997) (holding a § 1983 suit alleging the invalidity of a search warrant must be dismissed because it constituted an "impermissible collateral attack on Plaintiff's conviction").

50. 195 F.3d 553 (10th Cir. 1999).

51. *Id.* at 555-58.

52. *Id.* at 557-58. The court ultimately held the illegal search claim was barred by the applicable statute of limitations. *Id.* at 558.

53. No. 95-5256, 1996 WL 422046 (10th Cir. July 29, 1996).

54. *Id.* at *1. *But see* *Bonner v. Flowers*, No. 95-6196, 1996 WL 1820, at *1-2 (10th Cir. Jan. 3, 1996) (holding that a search and seizure of property that occurred after an investigative stop of the plaintiff's vehicle could *not* proceed prior to the favorable termination of the plaintiff's conviction because if the stop of the vehicle was found unlawful and damages were awarded, the conviction would have been undermined).

55. 51 F.3d 252 (11th Cir. 1995) (per curiam).

56. *Id.* at 253.

57. *Id.* at 253 n.1 (citation omitted). Despite the court's statement that the illegal search claim by Datz could proceed, the court found that Datz' claim attacking events preceding his state conviction was barred by the *Rooker-Feldman* doctrine. *Id.* at 253-54. The *Rooker-Feldman* doctrine holds that federal courts "may not decide federal issues that are raised in state proceedings and 'inextricably intertwined' with the state court judgment." *Id.* at 253 (quoting *Staley v. Ledbetter*, 837 F.2d 1016, 1018 (11th Cir. 1988)).

invariably and consistently undermine the previous criminal conviction, the claim can go forward. These circuits interpret literally the phrase "necessarily imply the invalidity of [a] conviction" contained in *Heck*. Thus, § 1983 illegal search claims can proceed absent a favorable termination because it is *possible* that the conviction would have occurred without the search and seizure or that the evidence seized could have been legally obtained at a later date as footnote seven of *Heck* suggests.⁵⁸

B. Example Position Held by the Second, Fifth, Sixth, and Ninth Circuits

As stated previously, the Second, Fifth, Sixth, and Ninth Circuits interpret *Heck*'s footnote seven as an *example* of a § 1983 claim that may or may not undermine a previous conviction and thus must be determined on a case-by-case basis.⁵⁹ Consequently, a § 1983 claim for an illegal search is subject to the equivalent scrutiny that other § 1983 causes of action receive, namely, a plaintiff must demonstrate that success on the illegal search claim will not "imply the invalidity" of the previous conviction.⁶⁰ These circuits insist that the Supreme Court intended footnote seven to be illustrative, not dispositive. Thus, § 1983 claims based on an illegal search may proceed prior to the favorable termination of a conviction only if the plaintiff can show that the civil suit will not serve as a collateral attack on the previous conviction.⁶¹

The Second Circuit, although lacking a comprehensive or extended discussion, did have occasion to discuss when it was appropriate to bring a § 1983 illegal search claim in the 1995 case, *Woods v. Candela*.⁶² The plaintiff in *Woods* alleged in a § 1983 action that a police officer violated his Fourth Amendment rights when the officer detained the plaintiff and searched his vehicle without reasonable suspicion.⁶³ Because over three years had expired between the initial arrest of the plaintiff and the filing of the § 1983 action, the State of New York claimed that the applicable statute of limitations had expired.⁶⁴ The court disagreed, however, and stated that the § 1983 illegal search claim

58. See *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994).

59. See *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000); *Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995); *Mackey v. Dickson*, 47 F.3d 744 (5th Cir. 1995) (per curiam); *Woods v. Candela*, 47 F.3d 545 (2d Cir. 1995) (per curiam).

60. *Heck*, 512 U.S. at 487.

61. It is important to note that the Exception and Example positions will sometimes yield the same result despite their different approaches to a § 1983 claim for an alleged illegal search. For example, if a court following the Example position holds that a particular § 1983 illegal search claim will not imply the invalidity of the previous conviction, the plaintiff will be allowed to proceed just as if the plaintiff had brought the case in a court that adheres to the Exception position. See, e.g., *Perry v. Wellington*, No. 98-4215, 1999 WL 1045170, at *1 (6th Cir. Nov. 9, 1999); *Braxton v. Scott*, 905 F. Supp. 455, 458 (N.D. Ohio 1995).

62. 47 F.3d 545.

63. *Id.* at 546.

64. See *id.*

“could not have been raised prior to the Appellate Division’s reversal of his conviction” because the claim would “necessarily imply that his conviction was unlawful.”⁶⁵ The *Woods* holding indicates that the Second Circuit adheres to the Example position because § 1983 claims for an illegal search are subject to *Heck*’s favorable termination requirement.⁶⁶

Like the Second Circuit, the Fifth Circuit has had few opportunities to discuss extensively the appropriateness of filing a § 1983 illegal search claim prior to the favorable termination of the plaintiff’s conviction. However, the Fifth Circuit in *Mackey v. Dickson*⁶⁷ did clearly articulate that the Fifth Circuit adheres to the Example position.⁶⁸ In *Mackey*, a plaintiff brought a § 1983 claim for an alleged illegal search and seizure while his criminal case for delivery of cocaine was still pending.⁶⁹ After the court admitted that “[t]he record does not clearly reflect that a successful attack on Mackey’s arrests will implicate the validity of his confinement,” it concluded: “[t]he court may—indeed should—stay proceedings in the section 1983 case until the pending criminal case has run its course, as until that time it may be difficult to determine the relation, if any, between the two.”⁷⁰ The *Mackey* case demonstrated that the Fifth Circuit read *Heck* to require a determination of whether the § 1983 illegal search claim would undermine the validity of the previous conviction.⁷¹ Absent a favorable termination, the ability of a plaintiff to pursue damages in a § 1983 suit is contingent on this question. Unlike the Exception position, the Fifth Circuit does not read footnote seven of *Heck* to provide a blanket exception for illegal search claims brought under § 1983.⁷²

Without question, the Sixth Circuit is the strongest advocate of the Example position among the Second, Fifth, and Ninth Circuit adherents. Just a few months after the *Heck* decision was rendered, the Sixth Circuit established its affiliation

65. *Id.*

66. *See id.*; *see also* Bourdon v. Vacco, No. 99-0261, 2000 WL 637081, at *1 (2d Cir. May 17, 2000) (recognizing that a § 1983 illegal search claim might not impugn the validity of a conviction, but that a determination “is inherently a factual one” (quoting Covington v. City of New York, 171 F.3d 117, 122 (2d Cir. 1999))); Covington, 171 F.3d at 122 (construing *Woods* as representing the Second Circuit’s contention that whether a § 1983 claim can be brought must be decided on a case-by-case basis contingent on the particular facts before the court).

67. 47 F.3d 744 (5th Cir. 1995) (per curiam).

68. *See id.* at 746.

69. *Id.* at 745-46.

70. *Id.* at 746.

71. *See id.*

72. *See id.*; *see also* Hudson v. Hughes, 98 F.3d 868, 872 (5th Cir. 1996) (applying the now-familiar test that, absent a favorable termination of the previous conviction, “Hudson’s section 1983 action may be entertained . . . only if the court determines that holding in Hudson’s favor will not necessarily call into question the validity of his convictions”); Salts v. Moore, 107 F. Supp. 2d 732, 737-38 (N.D. Miss. 2000) (dismissing plaintiff’s § 1983 illegal search claim because the plaintiff failed to demonstrate that his conviction had been invalidated), *appeal dismissed by* 250 F.3d 741 (5th Cir. 2001).

with the Example position in *Schilling v. White*.⁷³ The plaintiff in *Schilling* brought a § 1983 claim alleging that an illegal search occurred when two police officers searched his vehicle following a car accident.⁷⁴ The Sixth Circuit expressly rejected the Seventh Circuit stance (Exception position) that a claim of an illegal search is exempt from the *Heck* rule that the previous conviction must have been reversed before a § 1983 claim can proceed. The court stated:

[T]he Seventh Circuit continues to allow a Fourth Amendment exception to this [favorable termination] rule. . . . The Seventh Circuit misreads *Heck*. The fact that a Fourth Amendment violation may not necessarily cause an illegal conviction does not lessen the requirement that a plaintiff show that a conviction was invalid as an element of constitutional injury.⁷⁵

Thus, the Sixth Circuit would require a judicial determination in each § 1983 illegal search case regarding whether the asserted claim, if not previously reversed, would serve as a collateral attack on the criminal conviction by undermining its validity.⁷⁶

In *Shamaeizadeh v. Cunigan*,⁷⁷ the Sixth Circuit again addressed the polarization in the federal circuit courts regarding § 1983 illegal search claims. The plaintiff in *Shamaeizadeh* was arrested for violations of federal drug laws when a warrantless search of his home revealed marijuana plants and equipment used to make marijuana cigarettes.⁷⁸ After the district court ruled that the search of Shamaeizadeh's home was unconstitutional, Shamaeizadeh brought a § 1983 illegal search claim against the police officers who conducted the search, but he did so over one year after the initial search was conducted.⁷⁹ The court held that the one-year statute of limitations did not bar Shamaeizadeh's suit because "his cause of action under § 1983 did not accrue until the charges against him were dismissed."⁸⁰

73. 58 F.3d 1081 (6th Cir. 1995).

74. *Id.* at 1082-83.

75. *Id.* at 1086.

76. See e.g., *Perry v. Wellington*, No. 98-4215, 1999 WL 1045170, at *1 (6th Cir. Nov. 9, 1999) (allowing a § 1983 illegal search claim to proceed prior to a favorable termination of plaintiff's conviction because the claim was based on the manner in which the search was conducted and thus "would not imply the invalidity of his conviction"); *Brindley v. Best*, 192 F.3d 525, 530-31 (6th Cir. 1999) (holding that a § 1983 illegal search claim could proceed prior to reversal of the plaintiff's conviction without implicating its validity because the evidence obtained during the search was not used to convict the plaintiff); *Walker v. Minton*, No. 98-6627, 1999 WL 503476, at *2 (6th Cir. July 7, 1999) (holding that "to the extent that Walker sought economic damages for the alleged unlawful . . . search and ultimate convictions, the district court properly dismissed his § 1983 action because he did not show that his convictions had been set aside").

77. 182 F.3d 391 (6th Cir. 1999).

78. *Id.* at 393.

79. *Id.* at 393-94.

80. *Id.* at 397.

More important than the ultimate holding, however, was the Sixth Circuit's recognition that the federal circuit courts had adopted two divergent schools of thought on § 1983 illegal search claims: "Certain courts read this language to create a general exception to the doctrine of *Heck* for Fourth Amendment unreasonable-search claims brought against state officials under § 1983."⁸¹ The court then took issue with the Exception position and concluded, "This court read the footnote in *Heck* as *clearly rejecting* the conclusion that a general exception to the requirement that a conviction be set aside exists for Fourth Amendment claims under § 1983."⁸² Thus, the Sixth Circuit unequivocally holds that § 1983 illegal search claims are held to the same favorable termination standard articulated in *Heck* as other § 1983 claims.⁸³

Of the circuits adopting the Example position, the Ninth Circuit was the last to do so. It was not until the 2000 case *Harvey v. Waldron*⁸⁴ that the court expressly embraced the Example position.⁸⁵ In *Harvey*, the plaintiff brought a § 1983 action against numerous police officers, prosecutors, and Montana Department of Revenue employees, alleging that the defendants had violated his civil rights by conducting illegal searches leading to the subsequent illegal seizure of his property.⁸⁶ The charges against the plaintiff had been dismissed two and one-half years prior to the filing of the § 1983 claim, but the alleged illegal search took place nine years prior to the filing of the claim.⁸⁷ The Ninth Circuit held that the claim was filed within the three year statute of limitations because "a § 1983 action alleging [an] illegal search and seizure of evidence upon which criminal charges are based does *not accrue until the criminal charges have*

81. *Id.* at 395.

82. *Id.* at 396 (emphasis added); *see also* Bell v. Raby, No. 99-72917, 2000 WL 356354, at *6 (E.D. Mich. Feb. 28, 2000) ("the Sixth Circuit . . . has emphatically rejected" that *Heck* creates a general exception to the favorable termination requirement for § 1983 illegal search claims).

83. *See* Braxton v. Scott, 905 F. Supp. 455, 458 (N.D. Ohio 1995) (stating that *Schilling* and *Heck* both stand for the proposition "that fourth amendment claims are to be treated *no differently* than any other § 1983 claims which are related to convictions" (emphasis added)).

84. 210 F.3d 1008 (9th Cir. 2000).

85. *See* Schwartz v. City of Phoenix, 83 F. Supp. 2d 1102, 1104 n.2 (Ariz. 2000). Although the Ninth Circuit did not expressly adopt the Example position until the 2000 *Harvey* decision, the court did discuss § 1983 illegal search claims in light of *Heck* on several occasions before *Harvey*. *See* Housley v. United States, No. 97-15831, 1998 WL 476473 at *1 (9th Cir. July 28, 1998) (dismissing plaintiff's § 1983 claims, including an illegal search claim, because the injuries alleged related to the conviction and thus could not lie until a favorable termination had occurred); Pierce v. Mallon, No. 99-55454, 1996 WL 285711, at *1 (9th Cir. May 29, 1996) (dismissing § 1983 illegal search claim under *Heck* because evidence obtained during the search led to the defendant's conviction); Trimble v. City of Santa Rosa, 49 F.3d 583, 585-86 (9th Cir. 1995) (per curiam) (dismissing § 1983 illegal search claim for failure to file the claim within the one-year statute of limitations).

86. *Harvey*, 210 F.3d at 1010-11 & n.3.

87. *See id.* at 1010-11.

been dismissed or the conviction has been overturned."⁸⁸ Stated another way, a § 1983 illegal search claim does not enjoy a blanket exception under *Heck* to the favorable termination requirement.⁸⁹ If the *Heck* rule did not apply, the illegal search claim would have been barred by the applicable three-year statute of limitations because the claim could have been brought immediately after the search occurred.⁹⁰

In sum, the Second, Fifth, Sixth, and Ninth Circuits subscribe to the Example position and therefore treat § 1983 illegal search claims no differently than other § 1983 claims. A district court must determine if success on the illegal search claim undermines the validity of the previous criminal conviction. If not, the claim can proceed. If so, the claim is barred unless and until the plaintiff proves he has procured a favorable termination of the previous conviction.⁹¹

C. The § 1983 Plaintiff at the Mercy of Geography

Having presented the individual positions of the respective circuit courts, it is necessary to understand when the Exception and Example positions will yield decisively different results for plaintiffs claiming that searches violated their Fourth Amendment rights. With the current disparate treatment of § 1983 illegal search claims among the circuit courts, a plaintiff domiciled in Indiana (Seventh Circuit) may be allowed to bring a claim immediately while a plaintiff residing a mile away in Ohio (Sixth Circuit) would be prohibited despite identical fact patterns. If a convicted criminal seeks to assert a § 1983 illegal search claim prior to the favorable termination of the criminal conviction, the criminal's ability to proceed will depend on his location. Circuits that adhere to the Exception position will allow the claim to proceed irrespective of the status of the conviction.⁹² Meanwhile, circuit courts following the Example position will only allow the claim to proceed prior to a favorable termination if the district court determines that the illegal search claim will not undermine the validity of the conviction.⁹³

A second and less obvious situation where the outcome of a § 1983 illegal

88. *Id.* at 1015 (emphasis added).

89. See *Harned v. Landahl*, 88 F. Supp. 2d 1118, 1121 n.2 (E.D. Cal. 2000) ("[U]nder *Heck*, in order to recover damages under § 1983 for an alleged unconstitutional search the unlawfulness of which would render a conviction invalid, a plaintiff must prove that the conviction has been invalidated, either at the trial or appellate level.").

90. See *Harvey*, 210 F.3d at 1012-13; see also *Guerrero v. Gates*, 110 F. Supp. 2d 1287, 1290-91 (C.D. Cal. 2000) (holding the statute of limitations for plaintiff's § 1983 illegal search claim began to run when the plaintiff was no longer in custody, because while in custody, a favorable judgment would have implied that the plaintiff's conviction was invalid).

91. See *Harvey*, 210 F.3d at 1015; *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 394-95 (6th Cir. 1999); *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam); *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam).

92. See, e.g., *Copus v. City of Edgerton*, 151 F.3d 646, 647-48 (7th Cir. 1998).

93. See, e.g., *Schilling*, 58 F.3d at 1086.

search claim is contingent on the philosophy adopted by the circuit court is where the statute of limitations is an issue. The circuits that have construed *Heck*'s footnote seven to provide an exception to the favorable termination requirement for § 1983 illegal search claims start the statute of limitations "clock" on the date the alleged illegal search occurred.⁹⁴ Such a statute of limitations stance logically follows from the Exception position that holds "in all cases these [§ 1983 illegal search] claims can go forward."⁹⁵ Consequently, because an illegal search claim can be advanced immediately irrespective of the status of the criminal conviction, a plaintiff must be mindful of the statute of limitations for § 1983 actions within the particular state in which the alleged violation occurred.⁹⁶

In stark contrast to the Exception position, Example position courts posit that the statute of limitations does not begin until the conviction has been reversed or invalidated in some way.⁹⁷ Because the Second, Fifth, Sixth, and Ninth Circuits have construed *Heck* to require a favorable termination before a § 1983 illegal search claim can be asserted (unless the claim will not imply the invalidity of the conviction), these circuits necessarily hold that the statute of limitations "clock" does not begin to run until a plaintiff is eligible to bring the claim.

The inconsistency between the Exception and Example positions on the statute of limitations issue leads to an unfortunate disparity in treatment between similarly situated plaintiffs. Justiciability of a § 1983 claim is contingent on the plaintiff's zip code rather than the magnitude of the constitutional injury.

III. EXCEPTION AND EXAMPLE POSITIONS ANALYZED

A. *Advantages of the Exception Position Over the Example Position*

The Exception position, despite being sharply criticized by proponents of the Example position, has several compelling strengths that in some cases might make the Exception position preferable. First, the Exception position as articulated by the Seventh Circuit is consistent and simple to apply because "in all cases these claims [§ 1983 claims for an illegal search] can go forward."⁹⁸ As

94. See, e.g., *Beck v. City of Muskogee Police Dep't.*, 195 F.3d 553, 558 (10th Cir. 1999); *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998); *Woodward v. Paige*, No. 96-3202, 1997 WL 31548, at *3 (10th Cir. Jan. 27, 1997); *Perez v. Sifel*, 57 F.3d 503, 505 (7th Cir. 1995) (per curiam).

95. *Copus*, 151 F.3d at 648.

96. See *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (per curiam) ("The statute of limitations for section 1983 actions is determined by state law.").

97. See, e.g., *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 (6th Cir. 1999); *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999); *Schilling*, 58 F.3d at 1087 n.5; *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam). But see *Triestman v. Probst*, 897 F. Supp. 48, 50 (N.D. N.Y. 1995) (holding, without reference to *Heck v. Humphrey*, that the statute of limitations for a plaintiff's § 1983 illegal search claim began to run on the date the illegal search occurred).

98. *Copus*, 151 F.3d at 648.

a result of this clear mandate, judicial resources may be preserved. Courts that adhere to the Exception position do not need to ascertain on a case-by-case basis whether a § 1983 unreasonable search claim can go forward, as required by the Example position.⁹⁹ The Exception position avoids involved legal arguments that consume valuable judicial time by simply stating that irrespective of the particular circumstances of the case, a § 1983 illegal search claim can proceed prior to the favorable termination of the previous conviction.¹⁰⁰

A sampling of statistical data helps illustrate the point that judicial economy is a necessary concern for federal courts. Federal district courts have been faced with managing judicial dockets that saw 251,511 new civil cases filed in the twelve months preceding June 30, 1999, and 263,049 new civil cases filed in the twelve months preceding June 30, 2000.¹⁰¹ For the same twelve-month time period, the Circuit Courts of Appeals endured the filing of 54,816 new criminal and civil appeals in 1998-99 and 54,642 new criminal and civil appeals in 1999-2000.¹⁰² The burgeoning case loads in federal district courts has led to a backlog of litigation. In the twelve months preceding June 30, 2000, for example, a jury trial in federal district court took a median of *20.4 months* from the date of filing to resolution, with the Second Circuit requiring a median time of nearly *twenty-seven months*.¹⁰³ In light of the fact that a plaintiff seeking a jury trial in federal district court must wait over a year and one-half on average for resolution, it is self-evident that the Exception position's streamlined approach is a compelling argument on its behalf. While the Exception position decisively allows all § 1983 illegal search claims to proceed prior to a favorable termination, the Example position inundates an already overburdened federal judiciary with additional hearings to determine if a claim may be brought.¹⁰⁴

A second argument in favor of the Exception position focuses not on the simplicity of the Exception position, but rather on its recognition of the complexities that surround the admissibility of evidence in criminal proceedings. Exception position adherents correctly recognize that the admissibility of evidence in a criminal case is fundamentally different from holding that the

99. See *Pierce v. Mallon*, No. 99-55454, 1996 WL 285711, at *1 (9th Cir. May 29, 1996).

100. See *Copus*, 151 F.3d at 648-49.

101. ADMIN. OFFICE OF THE U.S. COURTS, Statistical Tables for the Federal Judiciary: June 30, 2000, at 22 tbl.C (2000).

102. *Id.* at 7 tbl.B.

103. *Id.* at 40 tbl.C5.

104. It is certainly true that, at first blush, the Exception position is more efficient than the Example position. However, it is important to note that the Exception position always allows the § 1983 illegal search claim to proceed while the extra hearing in the Example position courts may prohibit many § 1983 claims from proceeding on the merits. Thus, the additional time spent by Example position courts to determine if the § 1983 illegal search claim impugns the validity of the criminal conviction, rather than exacerbating the problem of an overwhelmed judiciary, could potentially be *less* of a burden on the federal judiciary than always allowing the claim to proceed. See *infra* Part IV.A.

evidence was obtained legally.¹⁰⁵ Stated another way, police occasionally obtain evidence that can survive a motion to suppress and is therefore admissible, but nevertheless violate the criminal defendant's civil rights. For example, police could search a home pursuant to a validly executed search warrant and find narcotics, but in the process ransack the home by intentionally breaking expensive antique china dishes belonging to the homeowner to "teach the homeowner a lesson." If the narcotics were submitted as evidence and used to convict the homeowner of drug possession, the Example position would likely prohibit the homeowner from seeking damages via a § 1983 illegal search claim unless and until the criminal conviction was favorably terminated.¹⁰⁶ Although common sense dictates that the narcotics should be admissible in the subsequent criminal proceeding against the homeowner, it is equally obvious that the criminal defendant should be entitled to seek damages for what was essentially a legal search that was conducted illegally. The Exception position would allow the homeowner who was convicted of narcotics possession to seek damages nevertheless under a § 1983 illegal search cause of action for pecuniary losses associated with the irresponsible destruction of his antique china.¹⁰⁷

*Heck v. Humphrey*¹⁰⁸ itself in footnote seven provides further situations where evidence may be illegally obtained and yet be admissible.¹⁰⁹ The Court cites doctrines like "independent source,"¹¹⁰ "inevitable discovery,"¹¹¹ and "harmless error"¹¹² that all allow for illegally obtained evidence to be used to

105. *Copus*, 151 F.3d at 648 (noting that "tainted evidence . . . [could] have been admitted anyway (e.g., under a theory of inevitable discovery)).

106. *See Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995). The Sixth Circuit stated the unyielding proposition that "[u]nless that conviction has been reversed, there has been no injury of constitutional proportions, and thus no § 1983 suit may exist." *Id.* Thus, in the above hypothetical, the homeowner would have no § 1983 remedy. However, other Example position decisions from the Sixth Circuit appear to permit a case-by-case determination. *See Brindley v. Best*, 192 F.3d 525, 530-31 (6th Cir. 1999).

107. *See Copus*, 151 F.3d at 649 ("The point is that it is possible for an individual to be properly convicted though . . . his home [is] unlawfully searched. The remedy . . . is a civil action under § 1983")

108. 512 U.S. 477 (1994).

109. *See id.* at 487 n.7.

110. *Black's Law Dictionary* describes the doctrine of independent source as dictating that "evidence obtained by illegal means may nonetheless be admissible if that evidence is also obtained by legal means unrelated to the original illegal conduct." BLACK'S LAW DICTIONARY 774 (7th ed. 1999).

111. The doctrine of inevitable discovery holds that "evidence obtained by illegal means may nonetheless be admissible if the prosecution can show that the evidence would eventually have been legally obtained anyway." *Id.* at 780.

112. Harmless error is defined as "an error that does not affect a party's substantive rights or the case's outcome." *Id.* at 563. For an example of when harmless error is invoked in an Exception jurisdiction to allow a plaintiff to proceed with a § 1983 claim prior to a favorable termination, see *Simmons v. O'Brien*, 77 F.3d 1093, 1094-95 (8th Cir. 1996).

convict a criminal defendant.¹¹³ It is very plausible that when one of the foregoing doctrines is asserted by a prosecutor in an attempt to make illegally obtained evidence admissible, an action for damages could be warranted for the manner in which the evidence was obtained. The Example position offers no § 1983 remedy for the criminal defendant in such cases because the evidence was used to convict the defendant and thus cannot be attacked collaterally through a civil action prior to a favorable termination.¹¹⁴ By contrast, the Exception position is unconcerned with either the admissibility of the evidence in the criminal case or the status of the conviction of the § 1983 plaintiff. Rather, the Exception position focuses on the *legality* of the search and the existence of legitimate compensable injuries as a result of the search.¹¹⁵

B. Advantages of the Example Position Over the Exception Position

Several arguments exist in support of the proposition that the Example position is preferable to the Exception position. First, and perhaps most compelling, is that the Example position avoids the appearance of inconsistent verdicts by refusing to award damages in a civil case for a search that yielded admissible evidence in a criminal proceeding. Several courts adopting the Example position have stated their concern that the Exception position creates an image to the public of inconsistent verdicts between the civil and criminal court systems.¹¹⁶ The Exception position invites legal challenges that appear patently inconsistent to the public because a convict is able to seek damages stemming from a search that yielded evidence that led to the criminal's conviction. Although legal scholars may understand the subtle but important differences between admissible evidence and legally obtained evidence, the distinction may be lost on the average citizen who may not understand how evidence declared by a criminal judge as admissible against a defendant can simultaneously provide the criminal with a financial windfall in a civil court. Although the law need not be constrained by those who fail to fully understand its complexities, the judiciary's legitimacy is derived from the amount of respect and confidence it commands from the general public. Consequently, the Example position's ability to perpetuate the appearance of consistency between the civil and criminal courts

113. *Heck*, 512 U.S. at 487 n.7.

114. *See, e.g.*, *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 (6th Cir. 1999); *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995).

115. *Cf. Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998) ("The fact that some evidence used in a trial is tainted by illegality does not necessarily undermine the conviction . . .").

116. *See, e.g.*, *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (stating that embracing the Example position "will avoid the potential for inconsistent determinations on the legality of a search and seizure in the civil and criminal cases and will therefore fulfill the *Heck* Court's objectives of preserving consistency and finality"); *Shamaeizadeh*, 182 F.3d at 397-98 (stating that if the Exception position were followed "there would be a potential for inconsistent determinations in the civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit").

is a key reason why four circuits have adopted it.¹¹⁷

A second advantage the Example position holds over the Exception position is that the Example position avoids the duplicative nature of the Exception position with respect to litigating virtually the same issue twice. The Exception position forces civil courts to adjudicate claims for damages after a criminal court has already ruled on the legality and admissibility of the evidence obtained during a search and seizure.¹¹⁸ In cases where the subsequent civil claim is clearly frivolous, the Example position offers courts an escape route to dispose of a case short of a procedural mechanism like summary judgment or a Rule 12(b)(6) Motion to Dismiss.¹¹⁹ In effect, the Example position, while acknowledging that civil claims for damages are different from criminal admissibility of the evidence, allows civil courts the option to respect the decision of the criminal court regarding the legality of the search and seizure of property. In situations where a criminal judge has determined that a search was conducted in congruence with the mandates of the Fourth Amendment, the Example position affords a civil judge the option of refusing to hear a claim that would collaterally attack the previous determination.¹²⁰ By contrast, the Exception position guarantees that a civil case can be brought to challenge the legality of a search even in the face of a convincingly prudent and lopsided decision by a criminal judge that the search was lawful.¹²¹ In such cases, the Example position offers a means to avoid

117. See, e.g., *Harvey*, 210 F.3d at 1015; *Shamaeizadeh*, 182 F.3d at 397-98. In fairness to the Exception position, however, “consistency” can also be compromised by the Example position. As previously discussed under the advantages of the Exception position, the Example position may leave some would-be § 1983 plaintiffs without a remedy for a constitutional violation suffered at the hands of overzealous police merely because the evidence seized was used to produce a conviction. A court’s refusal to provide a remedy to a party whose constitutional rights have been trampled does a disservice to the promotion of “consistency” and justice; perhaps as much of a disservice as allowing collateral attacks in civil court on evidence used to obtain a criminal conviction.

118. Some federal courts have even held that a plaintiff’s attempt to obtain money damages for an alleged illegal search, after a criminal court in a suppression hearing found that the evidence was obtained legally, constituted relitigation of the same claim and therefore was barred by the doctrine of collateral estoppel. See, e.g., *Scott v. Sutker-Dermer*, 6 F. App. 448, 449-50 (7th Cir. 2001); *Cornett v. Longois*, 871 F. Supp. 918, 923 (E.D. Tex. 1994).

119. Although courts adhering to the Exception position can dismiss frivolous claims prior to a trial on the merits, significant legal expense will be incurred by a state before the claim can be dismissed, even if only briefs for a motion to dismiss are necessary to defeat the claim. Conversely, the Example position provides the state with a more expeditious way to dispose of § 1983 illegal search claims before the claim is even acknowledged as justiciable.

120. See *Bell v. Raby*, No. 99-72917, 2000 WL 356354, at *6 (E.D. Mich. Feb. 28, 2000).

121. The thoughtful critic at this point would be correct to point out that § 1983 illegal search claims that offer little or no chance of recovery are generally unlikely to be pursued. Plaintiffs are generally unwilling to waste money on litigation doomed to failure, and lawyers, for ethical reasons, are generally hesitant to take cases that are patently frivolous. However, plaintiffs who are incarcerated and proceed pro se have little to lose by filing a frivolous claim. In such cases the

duplicative litigation and respect the decision of criminal tribunals.

The third strength of the Example position is that it allows courts to be more precise and fact-sensitive in their analysis of whether a § 1983 illegal search claim can proceed. Whereas the Exception position provides a blanket rule that allows all § 1983 illegal search claims to go forward in all cases,¹²² circuits that adhere to the Example position are able to evaluate claims on a case-by-case basis and issue a ruling that is contingent on the particular facts and circumstances of the case.¹²³ As a general proposition, a case-specific method will allow courts to determine *better* which § 1983 illegal search claims are deserving of being adjudicated on the merits than will a blanket rule that offers uniformity and simplicity, but little precision. The Example position arguably will act as a judicial filter to preclude collateral attacks that will “demonstrate the invalidity of any outstanding criminal judgment” while maintaining the flexibility that is necessary to allow meritorious § 1983 unlawful search claims to proceed.¹²⁴

IV. CHAMPIONING THE EXAMPLE POSITION

A. The Example Position Arguments Are More Persuasive

The aforementioned arguments in favor of the Example position are more compelling than those for the Exception position, and therefore the Example position is the preferable means to adjudicate § 1983 illegal search claims.

Taken as a whole, the Example position promotes judicial economy and efficiency to a greater extent than the Exception position. Although the Example position forces courts to conduct a hearing regarding whether a § 1983 illegal search claim will undermine the validity of the criminal conviction,¹²⁵ the Exception position forces courts to try the whole case.¹²⁶ Obviously, a hearing that disposes of a claim, by comparison to a trial, significantly reduces the amount of time and judicial energy that must be devoted to a § 1983 illegal search claim. Moreover, the Exception position allows a plaintiff to relitigate virtually the same legal issues that were decided in a previous criminal hearing, all at taxpayers' expense. The Example position, however, will only allow a § 1983

Example position intrinsically offers what the Exception position intentionally refuses—a procedural means to uphold criminal court determinations regarding the legality of a search and thereby disposing of frivolous cases from the outset.

122. See *Copus v. City of Edgerton*, 151 F.3d 646, 648-49 (7th Cir. 1998).

123. See, e.g., *Brindley v. Best*, 192 F.3d 525, 530-31 (6th Cir. 1999) (holding that *Heck* did not bar a § 1983 unlawful search claim because in the instant case the evidence was not used in the criminal proceeding against the defendant).

124. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

125. See *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 (6th Cir. 1999) (“[I]f a district court, after an independent review, determined that a § 1983 cause of action would not imply the invalidity of an outstanding conviction, the § 1983 action could proceed.” (emphasis added)).

126. See *Copus*, 151 F.3d at 648 (stating that “in all cases” a § 1983 illegal search claim can go forward).

illegal search claim to go forward if the district court determines it will not collaterally attack the criminal conviction.¹²⁷ Consequently, the Example position allows courts to dispose of illegal search claims after only a hearing rather than a full-blown trial.

A second reason why the Example position is preferable to the Exception position is that the Example position is more consistent and fair. The Example position is more likely to prohibit a convict from seeking to benefit financially from the same set of facts that resulted in his incarceration. Even if the plaintiff is ultimately unsuccessful, it is unacceptable to allow a convicted criminal to seek compensation for a search that was determined by a criminal court to be legal. In rare situations where the evidence was deemed admissible despite it being illegally obtained, the Example position permits a district court to determine that the particular § 1983 illegal search claim at bar can proceed.¹²⁸ Moreover, the Example position is more fair and precise than the Exception position because the Example position requires a case-by-case analysis of whether the plaintiff's situation warrants a deviation from the *Heck* rule. Thus, the Example position allows courts to treat all § 1983 illegal search claimants fairly and consistently. A plaintiff's § 1983 claim is justiciable only where a plaintiff can demonstrate either that his civil suit will not be a collateral attack on his previous conviction or that the previous criminal proceeding has been favorably determined.¹²⁹

The most compelling argument in favor of the Exception position is that evidence can be admissible in a criminal case because the search was warranted and yet the search itself was conducted in a manner that violated the defendant's Fourth Amendment rights. The hypothetical posed in Part III.A in which police intentionally destroyed the defendant's antique china illustrates an example of a claim that should be allowed to proceed despite the fact that the plaintiff had not received a favorable termination of his criminal conviction. However, the Example position, while not automatically permitting the § 1983 illegal search claim to proceed as the Exception position does, would nonetheless also allow this claim to be litigated. The Example position requires a district court to determine that the § 1983 illegal search claim will not undermine the validity of the criminal conviction.¹³⁰ In the previous hypothetical, the § 1983 claim challenges *how* the narcotics were obtained, not whether the criminal conviction or the search itself was valid. A district court adhering to the Example position would have little difficulty holding that the plaintiff's claim could go forward because it is not a collateral attack on the criminal conviction, but rather on the manner in which the search was conducted.

127. See *Shamaeizadeh*, 182 F.3d at 396.

128. See *id.* A § 1983 illegal search claim would actually be consistent with the criminal conviction because the judge at the suppression hearing determined that the evidence was illegally obtained, but that an exception to the suppression of evidence doctrine allowed the evidence to be admitted.

129. See *id.*; *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995).

130. See, e.g., *Shamaeizadeh*, 182 F.3d at 396; *Schilling*, 58 F.3d at 1086.

B. The Example Position More Accurately Applies Heck v. Humphrey

Justice Robert Jackson once admitted in a 1953 Supreme Court case, "We [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final."¹³¹ In light of Justice Jackson's astute insight, it is necessary to investigate whether the Example or Exception position more closely adheres to the language of the *Heck* opinion. Because the current circuit court split exists due to varying interpretations of the *Heck* decision by the respective circuit courts, it is inherently difficult to assess whether the Example or the Exception position is more consistent with *Heck*. However, the Example position deviates less from the Supreme Court stance regarding when § 1983 illegal search claims can be pursued.

The Supreme Court in *Heck*¹³² expressly stated the Court's concern with allowing civil actions to serve as a collateral attack on a criminal conviction: "This Court has long expressed . . . concerns for finality and consistency and has generally declined to expand opportunities for collateral attack."¹³³ The Court continued, "[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence"¹³⁴ Notably absent from the previous quote by the Supreme Court is any blanket exception carved out in the holding for § 1983 claims brought pursuant to an illegal search. If § 1983 illegal search claims were intended to be exempted from the black-letter holding of *Heck* as the Exception position adherents maintain, it is unusual that the Court failed to so state.

Moreover, even footnote seven of the *Heck* opinion, which is the sole source of the Exception position's stance, provides permissive language that is more plausibly construed as consistent with the Example position. Footnote seven states in pertinent part that "a suit for damages attributable to an allegedly unreasonable search *may* lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in . . . conviction."¹³⁵ The Court's use of the word "may" rather than "will" or "shall" is an important choice of language because it is evidence that the Supreme Court acknowledged only the *possibility* that § 1983 illegal search claims will not necessarily impugn the validity of the previous conviction. However, the Exception position's stance that "in all cases" § 1983 illegal search claims can go forward goes beyond the logical parameters of the word "may" and essentially interprets "may" as analogous to "in all cases."¹³⁶ While such a textual construction would be warranted had the word "will" or "shall" been used, the use of the word "may" directly contradicts the idea that a blanket exception was intended. The Example

131. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

132. 512 U.S. 477 (1994).

133. *Id.* at 484-85 (citations omitted).

134. *Id.* at 487.

135. *Id.* at 487 n.7 (emphasis added).

136. *Copus v. City of Edgerton*, 151 F.3d 646, 648 (7th Cir. 1998).

position, on the other hand, acknowledges that § 1983 illegal search claims may sometimes be exempted from *Heck*'s preclusive effect but leaves the decision to a district court.¹³⁷ Stated simply, the word "may" more fittingly creates an example than a "general exception."¹³⁸

C. "Necessarily" Resolving the Circuit Split

The Supreme Court must do more than declare that district courts must determine on a case-by-case basis (as the Example position holds) whether a § 1983 illegal search claim can proceed. District courts within the Seventh, Eighth, Tenth, and Eleventh Circuits that currently allow § 1983 illegal search claims to proceed irrespective of the failure to meet the favorable termination requirement would still allow these claims to be brought because the district court would simply hold in every case that the claims are not a collateral attack on the previous conviction. Consequently, merely forcing the Exception adherents to conduct a district court determination for each individual § 1983 illegal search claim would not alter the current rule that § 1983 illegal search claims can go forward "in all cases."¹³⁹ It is readily apparent, then, that to bridge the chasm that separates the Exception and Example positions, the Supreme Court must go further than merely mandating a case-by-case approach.

The current circuit court split emanates in part from differing interpretations of the Supreme Court's use of the word "necessarily" in *Heck*.¹⁴⁰ The Court stated:

[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.¹⁴¹

The Exception adherents interpret "necessarily" to mean that a § 1983 claim must *always, in every situation* undermine the validity of a criminal conviction for the claim to be barred by *Heck*.¹⁴² For example, a successful § 1983 suit for an

137. See *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam).

138. *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000).

139. *Copus*, 151 F.3d at 648.

140. *Heck*, 512 U.S. at 487.

141. *Id.* (emphasis added).

142. *Cf. Copus*, 151 F.3d at 648. The Seventh Circuit discussed its interpretation of "necessarily":

We need not speculate concerning which claims under § 1983 would *not* "necessarily" imply the invalidity of a civil plaintiff's underlying conviction because the Supreme Court has answered this question. In *Heck*, the Court dropped a footnote to describe the type of action which, "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment . . . [namely] a suit for damages attributable to an allegedly unreasonable search"

unreasonable seizure brought after the plaintiff was arrested and convicted for the crime of resisting arrest would “necessarily” invalidate the conviction because one of the elements of the crime of resisting arrest is that the police officer was conducting a legal arrest.¹⁴³ Thus, if a plaintiff’s § 1983 claim can only be successful if it negates one of the elements of the crime that led to the plaintiff’s conviction, the Exception courts would hold that the claim is barred by *Heck* because in all cases the claim would challenge the conviction. However, in the case of § 1983 illegal search claims, *Heck* does not prohibit any of the claims from being brought because there are situations in which the unreasonable search claim will not “necessarily imply the invalidity” of the conviction.¹⁴⁴

The Example position adherents utilize a narrower view of the Supreme Court’s use of the word “necessarily” by conducting a case-by-case analysis.¹⁴⁵ The Second, Fifth, Sixth, and Ninth Circuits have held that if the § 1983 claim will impugn the validity of the conviction *in the instant case*, then the claim cannot proceed because it “necessarily” implies the invalidity of the conviction.¹⁴⁶ With respect to § 1983 illegal search claims, the Example position mandates that some claims are barred pursuant to *Heck* while others are not because the “necessarily” requirement is applicable to only the case before the court at the time.¹⁴⁷ Therefore, there is a need for a district court determination regarding the justiciability of the § 1983 illegal search claim.

In summary, the Exception and the Example positions differ in their treatment of § 1983 illegal search claims because of the manner in which the respective circuits construe the definition of “necessarily.” The Exception position holds that *Heck* precludes a § 1983 claim only when in all feasible cases

Id. (quoting *Heck*, 512 U.S. at 487 n.7).

143. *Heck*, 512 U.S. at 487 n.6; *James v. York County Police Dep’t*, 167 F. Supp. 2d 719, 721 (M.D. Pa. 2001).

144. *See Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998) (“The fact that some evidence used in a trial is tainted by illegality does not *necessarily* undermine the conviction . . .” (emphasis added)).

145. *See Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995). While criticizing the Seventh Circuit’s application of *Heck*, the Sixth Circuit in *Schilling* remarked, “The fact that a Fourth Amendment violation may not *necessarily cause* an illegal conviction does not lessen the requirement that a plaintiff show that a conviction was invalid as an element of *constitutional injury*.” *Id.* (emphasis added). This passage reflects the Sixth Circuit’s rejection of the Exception position’s interpretation of “necessarily” as meaning in all cases the claim must undermine a conviction.

146. *E.g.*, *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam). *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999) summarized the *Mackey* court as holding that “Fourth Amendment claims could be brought under § 1983 notwithstanding a valid conviction, but only once the district court has made an independent determination that success on the § 1983 claim would not demonstrate the invalidity of the conviction.” *Id.* at 395.

147. *See Shamaeizadeh*, 182 F.3d at 396; *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) (remanding the case to the trial court to determine if, pursuant to the facts of this particular case, the § 1983 claims asserted would invalidate the conviction if successful).

the claim must undermine the validity of the conviction.¹⁴⁸ Because § 1983 illegal search claims do not always collaterally attack the previous conviction, these claims do not satisfy the “necessarily” language of *Heck* that bars most § 1983 claims. Conversely, the Example position adjudicates § 1983 illegal search claims on a case-by-case basis and thus construes “necessarily” to mean that *Heck* prohibits a § 1983 claim if, in that particular case, the claim impugns the validity of the previous conviction.¹⁴⁹

The Example position’s interpretation of the *Heck* opinion, and “necessarily” in particular, is preferable to the Exception position for virtually all of the same reasons as discussed in Part IV.A. of this Note.¹⁵⁰ Adjudicating § 1983 illegal search claims on an individual basis with a sensitivity towards the particular fact pattern of the case grants the Example position the precision to determine when a claim will “necessarily imply the invalidity” of the conviction.¹⁵¹ While the Exception position adherents are correct to insist that not all § 1983 illegal search claims “necessarily” threaten the validity of a previous criminal conviction,¹⁵² certainly, given the right set of circumstances, some claims inevitably will serve as a collateral attack. Therefore, a judicial determination in each case is warranted. Neither a blanket prohibition nor an automatic ability to proceed with the § 1983 claim does justice to the vast differences that will appear among various § 1983 illegal search claims.

CONCLUSION

The Example position offers the preferable method of adjudicating § 1983 illegal search claims. The Example position preserves precious judicial resources, while enabling federal judges to reach a fair and reasonable result, because hearings are conducted in every § 1983 illegal search case to ensure the claim is not a collateral attack on a previous criminal conviction.

The Supreme Court will not successfully resolve the current circuit split by merely declaring the Example position as the preferable position. However, the divergent means of adjudication between the Example and Exception positions can be resolved by the Supreme Court in a simple, even novel, way. The source of the circuit court dispute emanates from different meanings assigned to the word “necessarily” as it is used in the *Heck* decision.¹⁵³ The substantial differences in treatment of § 1983 illegal search claims among circuits that adhere to the Example and Exception positions can be resolved with a simple, but thorough, Supreme Court clarification of its use of “necessarily” in *Heck*. No monumental change in substantive law or judicial restructuring is necessary to

148. See *Apampa*, 157 F.3d at 1105; *Copus v. City of Edgerton*, 151 F.3d 646, 648 (7th Cir. 1998).

149. See *Schilling*, 58 F.3d at 1086; *Mackey*, 47 F.3d at 746.

150. See *supra* Part IV.A.

151. 512 U.S. 477, 487 (1994).

152. See *Apampa*, 157 F.3d at 1105; *Copus*, 151 F.3d at 648.

153. *Heck*, 512 U.S. at 487.

provide all § 1983 litigants, irrespective of the circuit, a consistent and meaningful means of adjudicating their claim.

In a nation where federal law is the supreme law of the land pursuant to the wishes of our Founding Fathers,¹⁵⁴ it is the federal judiciary's profound responsibility to apply federal law in an impartial and judicious manner. When federal substantive law varies from circuit to circuit, such consistent application is impossible and serves to undermine the legitimacy and integrity of the legal process. It is unacceptable for plaintiffs in the federal system to have the viability of their § 1983 illegal search claims decided by geography rather than the merits of the case. Because uneven application of the law invariably makes for bad law, the Exception and Example positions must be reconciled through a carefully crafted Supreme Court decision. Uniformity of § 1983 illegal search law must be restored to the federal judiciary.

154. See U.S. CONST. art. VI, cl. 2. This provision is known informally by constitutional scholars as the "Supremacy Clause."

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